

1-1968

## Restitution: Concept and Terms--Introduction and Historical Background

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### Recommended Citation

Peter W. Davis, *Restitution: Concept and Terms--Introduction and Historical Background*, 19 HASTINGS L.J. 1167 (1968).

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# RESTITUTION: CONCEPT AND TERMS

## Introduction and Historical Background

It is well established that much of the American legal system and many of its problems stem directly from the English common law.<sup>1</sup> This is especially true of the field of law which we now call "Restitution,"<sup>2</sup> and it seems appropriate to preface this discussion of current problems in classification and terminology with a brief statement of the history of restitution, although it is readily available in copious detail from many sources.<sup>3</sup>

The roots of restitution can be traced to some of the earliest common law proceedings in debt<sup>4</sup> and account<sup>5</sup> and, due to procedural difficulties in these actions, to some of the first bills in chancery.<sup>6</sup> Because of the popularity of seeking relief in chancery, the jealous common law courts developed the action of assumpsit.<sup>7</sup> The history of this action is long and confusing. But in brief, assumpsit was originally a tort action for negligent performance of an undertaking.<sup>8</sup> One branch of the action, called *indebitatus assumpsit*, then became concurrent with debt for a simple contract,<sup>9</sup> later became available for the implied in fact contract,<sup>10</sup> and finally picked up the

<sup>1</sup> *Norrington v. Wright*, 115 U.S. 188, 206 (1885); 1 J. KENT, *COMMENTARIES* \*473; R. POUND, *THE SPIRIT OF THE COMMON LAW* 1-11 (1921); W. WALSH, *A HISTORY OF ANGLO-AMERICAN LAW* § 45 (2d ed. 1932).

<sup>2</sup> See Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 1, 53 (1888).

<sup>3</sup> J. AMES, *LECTURES ON LEGAL HISTORY* (1913); J. DAWSON, *UNJUST ENRICHMENT* (1951); R. GOFF & G. JONES, *RESTITUTION* (1966); R. JACKSON, *THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW* (1936); W. KEENER, *QUASI-CONTRACTS* (1893); 5 R. POUND, *JURISPRUDENCE* 242 (1959); W. PROSSER, *The Borderland of Tort and Contract*, in *SELECTED TOPICS ON THE LAW OF TORTS* 380 (1953); S. STOLJAR, *QUASI-CONTRACTS* (1964); P. WINFIELD, *TORTS*, (1937); P. WINFIELD, *QUASI-CONTRACTS* (1952); P. WINFIELD, *PROVINCE OF THE LAW OF TORT* (1931); F. WOODWARD, *QUASI CONTRACTS* (1913); Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 1 (1888); Seavey & Scott, *Restitution*, 54 L.Q. REV. 29 (1938).

<sup>4</sup> *RESTATEMENT OF RESTITUTION*, Introductory Note at 5 (1937).

<sup>5</sup> *Id.*

<sup>6</sup> R. JACKSON, *THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW* 8 (1936); Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 53 (1888); York, *Extension of Restitution Remedies in the Tort Field*, 4 U.C.L.A.L. REV. 499 (1957).

<sup>7</sup> Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 1, 14 (1888).

<sup>8</sup> J. AMES, *LECTURES ON LEGAL HISTORY* 166 (1913); O.W. HOLMES, *Contract—I. History*, in *THE COMMON LAW* 270 (1881).

<sup>9</sup> Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 1, 53, 54 (1888); P. WINFIELD, *QUASI-CONTRACTS* 6 (1952). Slade's Case, 76 Eng. Rep. 1074 (K.B. 1603), is generally reputed to be the precedent for bringing assumpsit without a subsequent promise to pay a prior debt; however, the Queen's Bench allowed such an action as much as 60 years earlier. J. AMES, *LECTURES ON LEGAL HISTORY* 150-52 (1913).

<sup>10</sup> Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 1, 53, 54 (1888). One of the earliest cases was the Six Carpenters Case, 77 Eng. Rep. 695 (K.B. 1610). W. BLUME, *THE AMERICAN LAW OF CIVIL PROCEDURE* 8 (1955).

implied in law or quasi-contract.<sup>11</sup>

In *Moses v. Macferlan*,<sup>12</sup> decided in 1760, Lord Mansfield established "unjust enrichment" as the basis of the action of *indebitatus assumpsit*,<sup>13</sup> or quasi-contract as it was later termed,<sup>14</sup> and marked it as a separate and distinct common law obligation.<sup>15</sup> The chancery courts, however, were reluctant to relinquish jurisdiction once gained, and concurrent remedies in equity remained available to a person who had been deprived of his property by fraud, mistake or duress, as well as for breach of a fiduciary duty.<sup>16</sup> These alternative equitable remedies were by no means ignored,<sup>17</sup> due partly to the icy reception of *Moses v. Macferlan* by many English lawyers who were not quite ready for so vague a concept as unjust enrichment.<sup>18</sup>

In America *Moses v. Macferlan* was gradually accepted, and Dean Ames drew attention to the availability of the unjust enrichment action in his article, "The History of Assumpsit."<sup>19</sup> This article in turn inspired Dean Keener to publish a short treatise entitled *Quasi Contracts* in 1893,<sup>20</sup> after which the name, nature, scope and availability of the action were firmly established in this country.<sup>21</sup> Keener followed Dean Ames' lead<sup>22</sup> and included, besides unjust enrichment, first a statutory, official or customary duty and second a record or judgment as the bases of the obligation.<sup>23</sup> Analytically these obligations have little in common with unjust enrichment and should not be classified with it.<sup>24</sup> In any event, Keener devoted himself

<sup>11</sup> J. AMES, LECTURES ON LEGAL HISTORY 163 (1913). While there were earlier cases dealing with a customary duty, the foundation case for allowing *indebitatus assumpsit* on a promise implied in law without a supporting debt or contract was *Bonnel v. Foulke*, 32 Eng. Rep. 1224 (K.B. 1657). Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 1, 53, 54 (1888).

<sup>12</sup> 97 Eng. Rep. 676.

<sup>13</sup> J. AMES, LECTURES ON LEGAL HISTORY 164-65 (1913); J. DAWSON, UNJUST ENRICHMENT 11-15 (1951); 5 R. POUND, JURISPRUDENCE 252 (1959).

<sup>14</sup> Lord Mansfield did refer to the term *quasi ex contractu*, used in the Roman law. 97 Eng. Rep. at 678.

<sup>15</sup> F. WOODWARD, QUASI CONTRACTS 2 (1914).

<sup>16</sup> RESTATEMENT OF RESTITUTION, Introductory Note at 9 (1937); Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 1, 14-15 (1888); York, *Extension of Restitutional Remedies in the Tort Field*, 4 U.C.L.A.L. REV. 499, 510 (1957); see *Ripling v. Superior Court*, 112 Cal. App. 2d 399, 247 P.2d 117 (1952).

<sup>17</sup> See 2 J. STORY, EQUITY JURISPRUDENCE 605-06 (3d ed. 1886).

<sup>18</sup> Friedmann, *The Principle of Unjust Enrichment in English Law*, 16 CAN. B. REV. 365, 366 (1938).

<sup>19</sup> 2 HARV. L. REV. 1 (1888).

<sup>20</sup> W. KEENER, QUASI-CONTRACTS (1893).

<sup>21</sup> 5 R. POUND, JURISPRUDENCE 243 (1959). "Moreover, the treatise for the first time recognized and formally considered a large class of cases which have not received sufficient treatment, in our law at least, but which deserve a separate name and a separate classification." Abbot, Book Review, 10 HARV. L. REV. 209 (1896).

<sup>22</sup> Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 1, 53, 64 (1888).

<sup>23</sup> W. KEENER, QUASI-CONTRACTS 16 (1893); 5 R. POUND, JURISPRUDENCE 243 (1959).

<sup>24</sup> 5 R. POUND, JURISPRUDENCE 243 (1959) (the only connection between the three bases for quasi-contract as defined by Keener is historical-procedur-

solely to the action based on unjust enrichment,<sup>25</sup> and the inclusion of these two largely unrelated obligations did not detract from the beneficial effect of the work. A problem of more lasting character was his adoption of the title "quasi-contracts," of which more will be said later.<sup>26</sup> It should also be noted that Keener was solely concerned with relief given at law for the prevention of unjust enrichment. He excluded the corresponding equitable relief as well as the tort remedies which are restitutionary in nature.<sup>27</sup>

Keener's short but influential treatise was followed in 1913 by Woodward's book of the same title<sup>28</sup> which restated and brought the former work up to date. Woodward ignored other forms of restitutionary relief, but unlike Keener, he did not include judgments or official and statutory obligations as alternate bases of the action.<sup>29</sup>

The development of restitution has been sporadic and more the result of attempts to bring new actions within the existing framework of the common law, than the result of a purely logical progression.<sup>30</sup> While the various equitable remedies and the so-called quasi-contract actions were available to prevent unjust enrichment,<sup>31</sup> there was no recognition of a connection between them.<sup>32</sup> Thus the quasi-contract action was in a state of limbo, neither contract nor tort, lacking any clear place in the fundamental scheme of the law.<sup>33</sup>

The first comprehensive attempt to systematically treat this ubiquitous field of the law was made by the American Law Institute in the *Restatement of Restitution*, published in 1937.<sup>34</sup> The *Restatement* reporters, Professors Warren Seavey and Austin Scott, forged boldly ahead, bringing the great bulk of restitutionary remedies, both legal and equitable, under the umbrella of "restitution," and declared "tort," "contract," and "restitution" to be the three primary areas in

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al); Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 38 (1938); Abbot, Book Review, 10 HARV. L. REV. 209, 212-15 (1896).

<sup>25</sup> W. KEENER, *QUASI-CONTRACTS* (1893).

<sup>26</sup> See text accompanying notes 192-212 *infra*.

<sup>27</sup> W. KEENER, *QUASI-CONTRACTS* (1893).

<sup>28</sup> F. WOODWARD, *QUASI CONTRACTS* (1913).

<sup>29</sup> *Id.* at viii. "It is true that courts of equity, in the exercise of their jurisdiction to reform and rescind contracts, frequently enforce obligations to make restitution, but such obligations, while similar in many respects to those enforced at law, are not commonly regarded as a part of the law of quasi-contracts . . ." *Id.* at 8.

<sup>30</sup> See *Roske v. Ilykanyics*, 232 Minn. 383, 389, 45 N.W.2d 769, 774 (1951); R. JACKSON, *THE HISTORY OF QUASI-CONTRACTS IN ENGLISH LAW* 39 (1936); Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 1, 53 (1893).

<sup>31</sup> Note 16 *supra*.

<sup>32</sup> See Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 34-35 (1938).

<sup>33</sup> In the early English Law there was no distinction between contract and tort, and it took some 3 centuries before the two concepts were separated. W. PROSSER, *The Borderland of Tort and Contract*, in *SELECTED TOPICS ON THE LAW OF TORTS* 380 (1953). The addition of a third concept, restitution, seems to be equally slow, and not until the *Restatement of Restitution*, published in 1937, was much consideration given to the possibility of a third category. See 5 R. POUND, *JURISPRUDENCE* 243-44 (1959).

<sup>34</sup> Fraser, *Introduction to Symposium on the Oklahoma Law of Restitution*, 9 OKLA. L. REV. 301 (1956); Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 35 (1938).

the overall classification of the law.<sup>35</sup> The basis of the "restitution" classification is, of course, unjust enrichment.<sup>36</sup> Although the *Restatement* traversed great areas of the law in the material that was included, it was not a clean sweep.<sup>37</sup>

The appearance of the *Restatement of Restitution* marks the emergence of this category of the law into adolescence, and true to form, it trips over its own feet, grows at a phenomenal rate and is today still somewhat confused as to what it is and where it is supposed to be in the broad scheme of the law. Using the *Restatement* as a reference point, this comment seeks to inquire into the desirability of a separate category of the law dealing with unjust enrichment situations,<sup>38</sup> and to ascertain an appropriate name for such a category.

A logical starting point is to determine the value served by a tripartite classification of the law into "tort," "contract," and "restitution." It will then be asked whether such a tripartite classification is justifiable in theory and practice. Finally, in the light of the above two questions, can the *Restatement's* use of the term "restitution" as a principal heading in the classification of the law be justified, and has it been accepted in the American legal system?

### Necessity for a Tripartite Classification of the Law Into Tort, Contract and Restitution

Accepting the judgment of Dean Roscoe Pound, it may be said that:

Classification is a shaping and developing of traditional systematic conceptions and traditional systematic categories in order to organize the body of legal precepts so that they may be (1) stated effectively with a minimum of repetition, overlapping and potential conflict, (2) administered effectively, (3) taught effectively, and (4) developed effectively for new situations.<sup>39</sup>

Judged in the light of these standards, the *Restatement's* efforts in this direction show great promise. First, there is less repetition, over-

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<sup>35</sup> Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 31 (1938). "Actually there are, of course, no such distinctly segregated compartments of the law. Everywhere the fields of liability and doctrine interlock; everywhere there are borderlands and penumbras, and cases which cut across arbitrary lines of division . . ." W. PROSSER, *The Borderland of Tort and Contract*, in SELECTED TOPICS ON THE LAW OF TORTS 380 (1955). Nevertheless, it is useful to divide the law into categories. See R. POUND, JURISPRUDENCE 21 (1959). The *Restatement* and this comment are concerned only with the initial classification of the law, and no attempt will be made to subdivide the three primary categories. A few of the many subcategories of the law, e.g., constitutional law or bankruptcy law, are at first glance difficult to classify into any one or even a combination of the three primary categories. Since most, if not all, of these are purely statutory, however, the difficulty is insufficient to compel an increase in the number of primary categories of law to include these specialized subjects.

<sup>36</sup> RESTATEMENT OF RESTITUTION § 1 (1937).

<sup>37</sup> *Id.*, General Scope Note at 2; see text accompanying notes 82-121 *infra*.

<sup>38</sup> "Why pull together from all the corners of the law the concept of unjust enrichment . . .?" Macaulay, *Restitution in Context*, 107 U. PA. L. REV. 1133 (1959).

<sup>39</sup> 5 R. POUND, JURISPRUDENCE 21 (1959).

lap and potential conflict in dividing the basis of the law into promise, harm or injury, and unjust enrichment, than in dividing it into only promise and harm, considering those situations dealing with unjust enrichment under one or the other, whether or not promise or harm is pertinent.<sup>40</sup> The latter approach is conducive to confusion, as a number of cases illustrate.<sup>41</sup> This confusion seems to be the result of an incomplete understanding and acceptance of the basis of the category and its place in the law.<sup>42</sup>

<sup>40</sup> The only forms of action under the common law were those of tort and contract. W. KEENER, *QUASI-CONTRACT* 14 (1893). The basis of distinction was that a contract involved the duty to act, while a tort involved the duty to forbear. J. AMES, *LECTURES ON LEGAL HISTORY* 160 (1913). Since the new action based on unjust enrichment involved the duty to act, i.e. return something to its rightful owner, it was classified with contract. *Id.* There is little rational or practical basis for continuing such a classification since a contract action is based on a promise, express or implied, while the restitution action is based on unjust enrichment. See *McCall v. Superior Court*, 1 Cal. 2d 527, 531, 36 P.2d 642, 644 (1934); Holdsworth, *Unjustifiable Enrichment*, 55 L.Q. Rev. 37, 45-53 (1939). While it is sometimes said that a quasi-contract is a promise implied in law, *Philpott v. Superior Court*, 1 Cal. 2d 512, 518, 36 P.2d 635, 638 (1934), the promise is entirely fictitious, and was originally implied to circumscribe the rigid requirements of common law pleading. *Ward v. Taggart*, 51 Cal. 2d 736, 743, 336 P.2d 534, 538 (1959). It has been suggested that the term promise should not be used in connection with quasi-contract. *RESTATEMENT OF RESTITUTION*, Introductory Note at 9 (1937).

<sup>41</sup> "Long after the modern substantive law of contract had emerged from the shadows of the forms of action, confusion persisted as to its relations with quasi-contract. It was difficult to get the quasi-contract cases out of the contract category until a new category was developed in which to place them." E. DUFFEE & J. DAWSON, *CASES ON REMEDIES II RESTITUTION AT LAW AND IN EQUITY* 3 (1939). "The judicial attitude that there can be no recovery by a plaintiff in default stems in large part from an unwillingness or an inability to distinguish quasi-contract from actual contract . . ." Lee, *The Plaintiff in Default*, 19 VAND. L. REV. 1023, 1024 (1966). W. KEENER, *QUASI-CONTRACTS* 7 (1893). "The confusion involved in the use of the old phrase 'implied contract' to label both those 'implied in fact' and those 'implied in law' (now called 'quasi contracts') has not been entirely obliterated. Nor is it easy to eradicate." *Martin v. Campanaro*, 156 F.2d 127, 130 n.5 (2d Cir. 1946). "Considerable confusion now exists among the bench and bar as to the proper classification of this cause of action . . ." *Philpott v. Superior Ct.*, 1 Cal. 2d 512, 521, 36 P.2d 635, 639 (1934). The following cases indicate some degree of confusion: *Templeton Patents Ltd. v. J.R. Simplot Co.*, 220 F. Supp. 48, 60 (S.D. Idaho 1963) (quasi-contract is not a true contract but partakes of the nature of one); *Bartlett v. Raidart*, 107 Conn. 691, 142 A. 398 (1928) (confusion between implied in fact and quasi-contract); *Hier v. Anheuser-Busch Brewing Ass'n*, 60 Neb. 320, 83 N.W. 77 (1900) (action for restitution founded on a contract); *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150 (Tenn. 1966) (contractual relationship). A further difficulty is encountered where statutes refer to contract express or implied. *Stipp v. Doran*, 18 F.2d 83 (3d Cir. 1927) (Bankruptcy Act); *Ward v. Taggart*, 51 Cal. 2d 736, 336 P.2d 534 (1959) (punitive damages); *Stone v. Superior Court*, 214 Cal. 272, 4 P.2d 777 (1931) (attachment); *McCall v. Superior Court*, 1 Cal. 2d 527, 36 P.2d 642 (1934) (attachment); *Johnson v. National Exch. Bank*, 124 W. Va. 157, 19 S.E.2d 441 (1942) (jurisdiction of county courts).

<sup>42</sup> See *Shanks v. Wilson*, 86 F. Supp. 789, 794 (S.D. W. Va. 1949) (treats implied contract, quasi-contract and unjust enrichment as separate and apparently independent theories); *Hier v. Anheuser-Busch Brewing Ass'n*, 60

Dean Pound's second criterion, effective administration,<sup>43</sup> relates to the first, in that once the courts and practicing attorneys have a clear conception of the nature, scope and relation among various actions and remedies, it is much easier to apply effectively the right action and remedy to the situation at hand. It is suggested that the tripartite classification system proposed by the *Restatement of Restitution* has helped in this regard first, by focusing attention on the restitutionary remedies<sup>44</sup> and second, by delineating their nature, function, scope and relationship to tort and contract remedies. Even if the logic supporting such a classification system could be successfully refuted the actual result and operation of the system would still be beneficial.

It is in Dean Pound's third criterion, effective teaching,<sup>45</sup> that the value of a classification of the law into torts, contracts and restitution is most fully realized. Contract and tort writers tend to think in terms of consideration and promise, or harm and breach of a duty. They, at best, treat the restitutionary remedies as alternatives which must be discussed, however briefly, in order to show the effect they have had on the real subject under consideration, i.e. the tort or contract action.<sup>46</sup> The field of restitution is as comprehensive as each of the other two, and it cannot be expected that a complete statement of the subject would be included in tort or contract treatises or casebooks. In addition, what coverage restitution does receive in these works concerns only one part of the picture. The student must look to his torts book to find the alternative restitutionary remedies for misrepresentation and conversion; his contracts book for rescission, fraud, duress and illegal contracts; his trusts book for constructive trusts; his negotiable instruments book for payment by mistake in reliance on a forged negotiable instrument; his agency book for indemnity between principal and agent and for breach of a fiduciary duty by an agent; his suretyship book for indemnity and contribution; his equity book for contracts obtained by fraud, mistake, or duress; and his property book for ejectment.<sup>47</sup> As Professor John Dawson has said, "[t]he remedies aimed at restitution of unjust enrichment have grown like Topsy. They could be better described as a diversified litter of Topsy, with a common parentage that was only recently discovered. [As a result] . . . many lawyers still approach restitution remedies with uncertainty and wonder."<sup>48</sup> The most expedient solution to this problem is a unified treatment of

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Neb. 320, 83 N.W. 77 (1900) (action for restitution founded on a contract); *Rice v. Wheeling Dollar Sav. & Trust Co.*, 155 Ohio St. 391, 99 N.E.2d 301 (1951) (quasi-contracts implied in situations involving unjust enrichment or restitution); see Lee, *The Plaintiff in Default*, 19 VAND. L. REV. 1023, 1024 (1966).

<sup>43</sup> 5 R. POUND, *JURISPRUDENCE* 21 (1959).

<sup>44</sup> Macaulay, *Restitution in Context*, 107 U. PA. L. REV. 1133, 1134 (1959).

<sup>45</sup> 5 R. POUND, *JURISPRUDENCE* 21 (1959).

<sup>46</sup> See, e.g., W. PROSSER, *TORTS* § 94 (3d ed. 1964), where four and one-half pages are devoted to restitution; S. WILLISTON, *CONTRACTS* (3d ed. W. Jaeger 1957), where "restitution" is dealt with in scattered sections throughout the work (§§ 348, 536, 538, 898, 912-14, 1454-55, 1458-59, 1460a, 1478-80, 1485, 1600(f)).

<sup>47</sup> Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 34-35 (1938).

<sup>48</sup> Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175 (1959).

the subject. As was aptly pointed out by one recent writer, "[the] study of restitution as a unit aids in understanding each of the rules and remedies thereby brought together. Restitution's concepts are difficult and hardly understood from only a case or a note in a contracts, sales or similar casebook or treatise."<sup>49</sup> In addition to the unified treatment of this subject by the *Restatement of Restitution*, recent years have witnessed a few American casebooks on restitution<sup>50</sup> and some law schools now offer courses in the subject.<sup>51</sup> The battle is by no means won, however, as there has not yet been a comprehensive American work to follow the *Restatement* in this field,<sup>52</sup> and the tendency is still to concentrate on the quasi-contract side of restitution at the expense of the equitable remedies, and to exclude the tort restitutionary remedies altogether.<sup>53</sup> This tendency is further manifested by the failure of secondary reference materials to treat restitution as a separate subject. For example, West Publishing Company's *American Digest System* and *Corpus Juris Secundum* continue to treat quasi-contract under Contracts,<sup>54</sup> Money received,<sup>55</sup> and Assumpsit;<sup>56</sup> constructive trusts under Trusts;<sup>57</sup> and the rest of the restitutionary remedies under an assortment of headings ranging from Accord to Workmen's Compensation.<sup>58</sup> Since courts, attorneys and students of the law rely heavily on these sources of legal information, it is difficult for the *Restatement's* classification system to gain a foothold.

As to Dean Pound's fourth criterion of classification, effective development,<sup>59</sup> it cannot be denied that the restitutionary actions have grown rapidly.<sup>60</sup> However, it is submitted that the development in this area of the law would be more uniform and consistent, with less overlap and confusion, if the actions and remedies had an accepted framework within which to expand, rather than growing

<sup>49</sup> Macaulay, *Restitution in Context*, 107 U. PA. L. REV. 1133, 1134 (1959).

<sup>50</sup> 2 E. DURFEE & J. DAWSON, CASES ON REMEDIES, RESTITUTION AT LAW AND IN EQUITY (1939); J. DAWSON & G. PALMER, CASES ON RESTITUTION (1958) (revision of E. DURFEE & J. DAWSON, *supra*); E. PATTERSON, CASES ON RESTITUTION (1950); E. THURSTON, CASES ON RESTITUTION (1940); J. WADE, CASES AND MATERIALS ON RESTITUTION (2d ed. 1966).

<sup>51</sup> For example, University of California, Hastings College of the Law; University of California, Boalt Hall; University of California at Los Angeles; University of San Francisco; University of Southern California; Cornell University; University of Michigan; University of Chicago; University of Pennsylvania; Northwestern University.

<sup>52</sup> Maudsley, *Restitution in England*, 19 VAND. L. REV. 1123, 1126 (1966).

<sup>53</sup> Dean Wade's book, *supra* note 50 is complete; however, one of the more recent case books, H. LAUBE, CASES ON QUASI-CONTRACTS (1952), covers only the quasi-contract side of restitution while E. DURFEE & J. DAWSON, *supra* note 50 included the equitable remedies, but left out the tort restitutionary remedies. See also Dawson, Book Review, 38 CORNELL L.Q. 634, 635 (1953).

<sup>54</sup> 17 C.J.S. *Contracts* § 6 (1963).

<sup>55</sup> 58 C.J.S. *Money Received* §§ 1-33 (1948).

<sup>56</sup> 7 C.J.S. *Assumpsit* § 9 (1937).

<sup>57</sup> 89 C.J.S. *Trusts* §§ 139-59 (1955).

<sup>58</sup> C.J.S. *General Index R-Z* at 245-47 (1960).

<sup>59</sup> 5 R. POUND, JURISPRUDENCE 21 (1959).

<sup>60</sup> Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 192 (1959); Dawson, *A Symposium on Restitution*, 19 VAND. L. REV. 1019 (1966).



pell-mell in all directions.<sup>61</sup>

It thus seems clear that a classification system such as that suggested by the *Restatement of Restitution* can be of great benefit to the law and lawyer alike. Such a system deserves close analysis and attention so that it may properly guide the growth of restitutionary remedies. As Chief Justice Harlan Fiske Stone stated:

[A]ny system of law in which legal rules are always created *ad hoc* must at its best lack form and symmetry. Its development is not systematic, its precedents which collectively are its substance, because of the very method of their creation, lack a foundation of scientific and philosophical generalization on which all systems of law must ultimately rest if they are to endure and do their appointed work.<sup>62</sup>

It is suggested that the *Restatement of Restitution* has laid the groundwork for the "form and symmetry," as well as the "scientific and philosophical generalization" required by Justice Stone.

### Theoretical and Practical Justification of a Tripartite Classification of the Law

Justification of a tripartite division of the law must necessarily rest on the basis of the division. It is therefore appropriate to examine closely the basis of division suggested by the *Restatement of Restitution*.

The *Restatement's* division into contract, tort and restitution is postulated on the theory that the individuals in society have three "fundamental" interests that the law will protect.<sup>63</sup> These are the interest in the fulfillment of promises, the interest in freedom from harm by another, and the interest in having restored a benefit gained by one person at another's expense if the retention of the benefit by the other would be unjust.<sup>64</sup>

It is here suggested that one should start with the premise that the purpose of the law is to adjust the relations between parties in accordance with what is just.<sup>65</sup> That is, there is only one basic interest, justice, on which to base the law, rather than the three interests used by the *Restatement*. On such a basis, the first category, "contracts," includes situations in which a promise, express or implied in fact, is the foundation of the obligation. Thus, assuming it is just to require persons to perform promises which can be proved and which do not violate public policy, performance will be enforced or compensation will be required to place the promisee in approximately the position he would have held had the promise been performed. The second category, "torts," covers the fact situations of harm or injury to a person, and a person's interest in things or in

<sup>61</sup> "In fact the principal problem which has been faced in evolving the doctrine [unjust enrichment] has been precisely that of defining the limits within which it operates." Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law*, 36 TUL. L. REV. 605, 607 (1962).

<sup>62</sup> Stone, *Some Aspects of the Problem of Law Simplification*, in *ESSAYS ON JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW* 131 (1963).

<sup>63</sup> Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 31 (1938).

<sup>64</sup> *Id.*

<sup>65</sup> Dickinson, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW* 89, 91 (1941); E. BODENHEIMER, *JURISPRUDENCE* 213 (1962); see *Pink v. Title Guar. & Trust Co.*, 274 N.Y. 167, 8 N.E.2d 321 (1937).

other persons. Where one party has caused harm or injury to another, through no fault of the latter, it is just to require that the former make compensation to repair the harm. The third category, "restitution," encompasses situations in which one party has been unjustly enriched at the expense of another.

The tripartite classification is based in part on custom and convenience. Thus the law is divided to deal with fact situations in the most efficient and useful way, within the criteria for a classification system suggested by Dean Pound. Note that this division may or may not conform to the strict mandates of "pure logic," but logic is not the primary reason for, or basis of, the division.<sup>66</sup>

While the *Restatement's* basis undoubtedly accomplishes the same purpose as a division based on one interest to be protected, i.e. that of just treatment from other members of society with the divisions of the law based on three types of fact situations, it would be more accurate and more logically consistent with modern practice to adopt the latter view. For example, where the individual who has received unjust enrichment of some type has an election between tort and contract,<sup>67</sup> tort and restitution,<sup>68</sup> contract and restitution,<sup>69</sup> or among all three,<sup>70</sup> it seems difficult to argue that there are different and, by implication, mutually exclusive interests being protected. Under the "one interest" theory, on the other hand, the law would protect the plaintiff's right to just treatment at the hands of other members of society, and, subject to the rules for election of remedies, the plaintiff could plead, or the court would apply, the appropriate remedy according to the facts pleaded and proved. If the particular set of facts, then, fell under more than one division it would do no violence to the classification system regardless of what theory of recovery is finally applied. The "one interest" theory also seems more consistent with modern code pleading and is more conducive to growth since there would be greater flexibility throughout the system. In addition, this more direct approach might prevent further unfortunate fictions from arising, similar to those which have been invented by the courts in the past to cope with divisions and remedies of the legal system that have proved too inflexible to adapt to the changing conditions of society.<sup>71</sup>

It has been contended that "unjust enrichment" is an excessively vague concept upon which to base a category of the law, that it is so broad as to be meaningless.<sup>72</sup> If such is true, the same is true of the

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<sup>66</sup> 5 R. POUND, JURISPRUDENCE 12 (1959).

<sup>67</sup> W. PROSSER, TORTS § 93 (3d ed. 1964); P. WINFIELD, TORTS 7 (1937).

<sup>68</sup> Cawthon v. Bancokentucky Co., 52 F.2d 850 (W.D. Ky. 1931); W. PROSSER, TORTS § 94 (3d ed. 1964).

<sup>69</sup> Rains v. Arnett, 189 Cal. App. 2d 337, 11 Cal. Rptr. 299 (1961); Lucy v. Lucy, 22 Cal. App. 2d 629, 71 P.2d 949 (1937); Locke v. Duchesnay, 84 Cal. App. 448, 258 P. 418 (1927).

<sup>70</sup> Glantz v. Freedman, 100 Cal. App. 611, 280 P. 704 (1929).

<sup>71</sup> The most obvious example is the connection between actions based on unjust enrichment and contract. Seekamp v. Small, 39 Wash. 2d 578, 237 P.2d 489 (1951).

<sup>72</sup> Holdsworth, *Unjustifiable Enrichment*, 55 L.Q. REV. 37, 48-49 (1939); E. JENKS, THE NEW JURISPRUDENCE 268 (1933). See also the exchange between Dean Abbot, Book Review, 10 HARV. L. REV. 209 (1896), and Learned Hand,

premises on which contract and tort are based.<sup>73</sup> "Unjust enrichment" can scarcely be broader than "harm," and "promise" has been defined only after centuries of litigation. It is further submitted that the premise behind a principal category of the law must be broad enough to encompass the primary areas in the classification of the law. It is also true that a category of law cannot be defined in one or two sentences.<sup>74</sup> Only after extensive rules relating to the various types of fact situations within the category have been developed and refined, can the category be defined with any degree of accuracy,<sup>75</sup> and even then new situations are constantly arising which require reexamination of the various actions and remedies involved.

### Scope of the Category

It is appropriate at this point to determine precisely what the category of restitution should entail. As defined by the *Restatement*, restitution includes: first, those situations where recovery is allowed because property is transferred or services are rendered by mistake;<sup>76</sup> second, where a benefit is conferred upon another through coercion;<sup>77</sup> third, where money or property is transferred in expectation of receiving something which is not in fact obtained;<sup>78</sup> fourth, where a benefit is conferred without mistake, coercion or request but public policy sanctions recovery;<sup>79</sup> fifth, where a benefit was acquired (rightfully or wrongfully) without any act by the claimant for which the benefited party should account either in quasi-contract or constructive trust.<sup>80</sup>

Keeping in mind that the basis of the category is unjust enrichment, one might ask two preliminary questions which are actually two sides of the same coin. First, is the category, "restitution," all-inclusive, i.e. are all those situations covered in which the defendant has been unjustly enriched? Second, should the category be complete and all-inclusive, i.e. are there some situations in which the defendant has been unjustly enriched which ought not to be included in the "restitution" category for reasons of logic, procedure or convenience?

In answer to the first question, the category, as promulgated by the *Restatement of Restitution*, is not complete. The *Restatement* does not include the restitutionary tort remedies or the restitutionary rights which arise from breach of contract or trust.<sup>81</sup>

With reference to the second question, the principal areas of contention are the two excluded groups above and the merger of legal

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*Restitution or Unjust Enrichment*, 11 HARV. L. REV. 249 (1898), where Judge Hand successfully defended unjust enrichment as the basis of the quasi-contract action.

<sup>73</sup> Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 31 (1938).

<sup>74</sup> *Id.*

<sup>75</sup> Williams, *Language and the Law—II*, 61 L.Q. REV. 179, 193 (1945).

<sup>76</sup> RESTATEMENT OF RESTITUTION, Introductory Note at 1, 2 (1936).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> RESTATEMENT OF RESTITUTION, General Scope Note at 2 (1936).

and equitable actions by the *Restatement*.

Regarding the restitutionary tort remedies, a preliminary distinction should be made between the alternative restitutionary actions available for the commission of some torts, and the "tort" remedies which are themselves actually restitutionary in nature.

The more serious problem and one that has received very little consideration from legal writers is whether some of the remedies that have traditionally been considered under the heading of torts, could be better understood and administered under restitution. The remedies in question are ejectment, replevin, detinue and trover.<sup>82</sup>

Ejectment, although technically considered a tort remedy,<sup>83</sup> is generally dealt with in property law.<sup>84</sup> In view of the fact that the remedy is largely regulated by statute today,<sup>85</sup> and that the determinative issue is one of title rather than of unjust enrichment,<sup>86</sup> it does not appear that any advantage would result from uprooting the remedy of ejectment from its present position and including it under restitution.

In the case of trover and detinue, the same conclusion should probably be reached, although the argument is not so strong. In practice these two remedies have been largely superseded by the tort remedy of conversion.<sup>87</sup> While most actions of conversion could be explained on the basis of unjust enrichment,<sup>88</sup> they may also be viewed through the tort basis of harm to a person's property,<sup>89</sup> although the latter approaches the realm of fiction. Conversion is extremely technical in its rules,<sup>90</sup> and even Dean Prosser has been unable to find a satisfactory definition<sup>91</sup> for the action. It is perhaps arguable that had the category of restitution been established 100 years ago, most of those situations which now come under conversion would better have been placed under restitution on the basis of unjust enrichment. However, at the present time it would seem to be an almost insurmountable task to reclassify the action of conversion.

<sup>82</sup> See Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 38 (1938); Thurston, *Recent Developments in Restitution: 1940-1947*, 45 MICH. L. REV. 935, 936 (1947).

<sup>83</sup> 17 CAL. JUR. 2d *Ejectment* § 2 (1954).

<sup>84</sup> 1 R. AIGLER, A. SMITH & S. TEFFT, *CASES ON PROPERTY* 26 (1960); 3 R. POWELL, *REAL PROPERTY* ¶¶ 453-54 (1967); 6 *id.* ¶ 1027 (1965); *RESTATEMENT OF PROPERTY* § 222 (1936); see Thurston, *Recent Developments in Restitution: 1940-1947*, 45 MICH. L. REV. 935, 936 (1947).

<sup>85</sup> 28 C.J.S. *Ejectment* § 3 (1941).

<sup>86</sup> 17 CAL. JUR. 2d *Ejectment* § 2 (1954). Theoretically, only the right to possession and not title is at issue; however, title is frequently the basis of the claim. 28 C.J.S. *Ejectment* § 4 (1941).

<sup>87</sup> W. PROSSER, *TORTS* § 15, at 80-81 (3d ed. 1964). Conversion grew out of trover and is more a new name than a new action. *Id.* at 79. However, detinue is a separate action which has fallen into disuse. *Id.* at 80.

<sup>88</sup> *Cawthon v. Bancokentucky Co.*, 52 F.2d 850 (W.D. Ky. 1931); Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 38 (1938); Dawson, Book Review, 38 CORNELL L.Q. 634, 635 (1953) (argues for inclusion of conversion in the category of restitution).

<sup>89</sup> W. PROSSER, *TORTS* § 15, at 81 (3d ed. 1964); Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 38 (1938).

<sup>90</sup> W. PROSSER, *TORTS* § 15, at 79 (3d ed. 1964).

<sup>91</sup> *Id.*

First, the technical rules which have developed around the action are in many cases inapplicable to a restitutionary remedy;<sup>92</sup> and second, some situations in which recovery is allowed under conversion are not based on unjust enrichment and could not logically be included in the category of restitution.<sup>93</sup> In addition, restitutionary remedies are available as alternatives to conversion,<sup>94</sup> allowing the plaintiff a choice of basing his action on unjust enrichment or on harm.

Replevin is in much the same situation as the other restitutionary tort remedies; alternative restitutionary remedies are available,<sup>95</sup> and it would not appear that any useful purpose could be served by transferring its classification from tort to restitution.<sup>96</sup>

It may be argued that the exclusion of these restitutionary tort remedies of ejectment, detinue, trover and replevin from the restitution category is logically inconsistent as they clearly involve unjust enrichment.<sup>97</sup> However, as previously suggested,<sup>98</sup> modern classification of the law is not based exclusively on logic, but depends principally on how the material can be arranged to make it more useful and easily understood.<sup>99</sup> Furthermore an attempt to uproot these well-established tort actions and place them under restitution would cause rather than eliminate confusion, for each group of remedies may have a different statute of limitations,<sup>100</sup> a different rule of survival,<sup>101</sup> and a different measure of recovery.<sup>102</sup> In addition the plaintiff may now often avoid procedural pitfalls by electing to pursue one action or the other,<sup>103</sup> while the inclusion of the tort restitu-

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<sup>92</sup> The most important of these technicalities is the basic theory of the action that a forced judicial sale will be made. That is, the plaintiff is not required to accept the return of the thing with which the defendant interfered, and the defendant is considered to have "bought" it. W. PROSSER, *TORTS* § 15, at 80 (3d ed. 1964).

<sup>93</sup> For example, the plaintiff can recover against a defendant who found a lost chattel, made a good faith attempt to return it to the rightful owner, but mistakenly delivered it to the wrong party. *Id.* § 15, at 87-88. Obviously a recovery in this situation cannot be grounded on unjust enrichment.

<sup>94</sup> *Austin v. Wilcoxson*, 149 Cal. 2d, 26, 84 P. 417, 417 (1906); *Bastanchury v. Times-Mirror Co.*, 68 Cal. App. 2d 217, 156 P.2d 488 (1945); *Glantz v. Freedman*, 100 Cal. App. 611, 280 P. 704 (1929); *Olwell v. Nye & Nissen Co.*, 26 Wash. 2d 282, 173 P.2d 652 (1946).

<sup>95</sup> See Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 38 (1938).

<sup>96</sup> But see Dawson, Book Review, 38 CORNELL L.Q. 634, 635 (1953) (argues for inclusion of replevin in category of restitution).

<sup>97</sup> Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 Mo. L. REV. 223, 228 (1936) (not illogical); Seavey & Scott, *Restitution*, 54 L. Q. REV. 29, 38 (1938); cf. Thurston, *Recent Developments in Restitution: 1940-1947*, 45 MICH. L. REV. 935, 936 (1947).

<sup>98</sup> Text accompanying note 39 *supra*.

<sup>99</sup> 5 R. POUND, *JURISPRUDENCE* 12 (1959).

<sup>100</sup> Restitution actions have usually been considered contract actions for the purpose of the statute of limitations, *Philpott v. Superior Court*, 1 Cal. 2d 512, 36 P.2d 635 (1934), and the tort statute of limitations is usually shorter than the limitation on contract actions. Compare CAL. CODE CIV. PROC. § 338, with CAL. CODE CIV. PROC. § 337.

<sup>101</sup> W. PROSSER, *TORTS* § 120, at 921 (3d ed. 1964).

<sup>102</sup> *Id.* § 93, at 640-41.

<sup>103</sup> *Id.* § 93, at 639-43; York, *Extension of Restitutional Remedies in the Tort Field*, 4 U.C.L.A.L. REV. 499, 546 (1957).

tionary actions in the category of restitution might, as in the legal-equitable merger,<sup>104</sup> reduce the differences between them, and render the system less flexible.

The alternative restitutionary actions for the commission of a tort are well known by the phrase "waive the tort and sue in assumpsit."<sup>105</sup> This phrase, however, includes both contract and restitutionary situations<sup>106</sup> and is subject to the confusion between contract and quasi-contract referred to previously.<sup>107</sup> In any event, it is well established that restitutionary actions, legal and equitable, are available where the defendant tortfeasor has been unjustly enriched,<sup>108</sup> and, although the subject has not received as much attention from legal writers as it probably deserves, there appears to be little problem in this area.

The second group omitted by the *Restatement* involves the alternative restitutionary actions for the breach of a contract or trust. Except where a constructive trust could be applied, the *Restatement of Restitution* did not consider these actions since they had previously been covered in the *Restatement of Contracts* and *Restatement of Trusts*.<sup>109</sup> However, the situations concerned are clearly within the scope of restitution,<sup>110</sup> and could properly be included in any comprehensive work on the subject.

There are some problems remaining in this area, including the use of the term "rescission,"<sup>111</sup> whether punitive damages will be allowed in addition to restitution on a quasi-contractual claim,<sup>112</sup> and

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<sup>104</sup> See text accompanying note 120-25 *infra*.

<sup>105</sup> *Glantz v. Freedman*, 100 Cal. App. 611, 280 P. 704 (1929); *Olwell v. Nye & Nissen Co.*, 26 Wash. 2d 282, 173 P.2d 652, 653 (1947); *Johnson v. National Exch. Bank*, 124 W. Va. 157, 19 S.E.2d 441 (1942); *Corbin, Waiver of Tort and Suit in Assumpsit*, 19 YALE L.J. 221 (1910).

<sup>106</sup> 7 C.J.S. *Assumpsit* §§ 2, 9 (1937); 1 CAL. JUR. 2d *Actions* § 31 (1952); 5 *id.* *Assumpsit* § 11 (1967); see *Hallidte v. Enginger*, 175 Cal. 505, 166 P. 1 (1917).

<sup>107</sup> Note 41 *supra*.

<sup>108</sup> *Corbin, Waiver of Tort and Suit in Assumpsit*, 19 YALE L.J. 221 (1910); *Keener, Waiver of Tort*, 6 HARV. L. REV. 223 (1892); *Teller, Restitution as an Alternative Remedy for a Tort*, 2 N.Y.L.F. 40 (1956); *York, Extension of Restitutional Remedies in the Tort Field*, 4 U.C.L.A.L. REV. 499 (1957).

<sup>109</sup> RESTATEMENT OF RESTITUTION, General Scope Note at 2 (1936).

<sup>110</sup> *Fitzhugh v. University Realty Co.*, 46 Cal. App. 198, 201, 188 P. 1023, 1024 (1920); *Bollenback v. Continental Cas. Co.*, 243 Ore. 498, 414 P.2d 802 (1966); *Duffy v. Scott*, 235 Wis. 142, 292 N.W. 273 (1940); *E.L. Hustling Co. v. Coca Cola Co.*, 205 Wis. 356, 237 N.W. 85, *cert. denied*, 285 U.S. 538 (1931); 3 S. WILLISTON, *CONTRACTS* § 1455 at 2589 (Rev. ed. S. Williston & G. Thompson 1936); F. WOODWARD, *QUASI CONTRACTS* 410-11 (1913).

<sup>111</sup> *McCall v. Superior Court*, 1 Cal. 2d 527, 535, 36 P.2d 642, 646 (1934).

<sup>112</sup> In a most interesting California case, *Ward v. Taggart*, 51 Cal. 2d 736, 336 P.2d 534 (1959), Chief Justice Traynor, writing for the majority of the court, allowed the plaintiff to collect punitive damages although restitution formed the basis of his claim. The action was originally brought in tort for fraud against a real estate broker who, by misrepresenting himself as the agent of the seller, fraudulently made a \$72,000 profit. The plaintiff was awarded the \$72,000 profit and \$36,000 punitive damages. The unusual facet of the case is that the land was worth the amount paid by the plaintiff. Since there was no out of pocket loss and no damage, the California Supreme Court denied the tort basis of recovery. However, the court allowed recovery on

the failure of some courts to recognize the distinction between an action for damages and an action for restitution.<sup>113</sup> At least part of the uncertainty in dealing with the available remedies for breach of contract stems from the familiar confusion between contract and quasi-contract.<sup>114</sup> A separate treatment of the restitutionary alternative actions might help to alleviate confusion and facilitate development in the areas mentioned above. As to what actions are available, it would appear that in the case of a substantial breach of contract or failure of consideration, the plaintiff has the election of suing for specific performance (where applicable), damages for the breach, or for one of the restitutionary remedies.<sup>115</sup>

Woodward seemed to be concerned as to whether the election to bring an action for restitution is based on a primary or secondary obligation;<sup>116</sup> however, it is submitted that the question is immaterial in light of the tripartite classification suggested by the *Restatement of Restitution*. That is, tort, contract and restitution are coequal alternative primary rights; the important question is whether the plaintiff wishes to enforce the contract and go forward by specific performance, to be compensated for the failure of the other party to perform by damages, or to be returned more or less to his previously held position through recovery of that by which the plaintiff has been unjustly enriched.

### The Coalescing of Law and Equity

The third and last area of contention is the merger of legal and equitable actions. The *Restatement of Restitution* included in the "restitution" category both the legal action of quasi-contract and the equitable remedies of constructive trust, equitable lien, subrogation and accounting.<sup>117</sup> These equitable remedies had developed inde-

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the basis of unjust enrichment, referring to both quasi-contract and constructive trust. Concluding that quasi-contract is not the same as contract, the punitive damages award was allowed to stand on the basis of CAL. CIV. CODE § 3294 (which allows punitive damages for fraud or malice but not under contract), saying, "[s]uch damages [punitive] are appropriate in cases like the present one, where restitution would have little or no deterrent effect . . . ." *Id.* at 743, 336 P.2d at 538. The case is noted in 48 CALIF. L. REV. 342 (1960), where the writer said that this was the first time punitive damages had been awarded in such a case. It is uncertain whether the case is authority for allowing punitive damages only where the theory of recovery is a constructive trust, where it is quasi-contract, or in any action grounded on unjust enrichment. In any event, the case raises the question as to the compatibility of punitive damages and recovery based on unjust enrichment.

<sup>113</sup> *Frank v. Tavares*, 142 Cal. App. 2d 683, 689, 298 P.2d 887, 891 (1956) ("and a common count is sufficient basis for the finding of a quasi contract in the award of damages for unjust enrichment" (emphasis added)); *Bollenback v. Continental Cas. Co.*, 243 Ore. 498, 514, 414 P.2d 802, 809 (1966) (recognized the problem); *Lee, The Plaintiff in Default*, 19 VAND. L. REV. 1023, 1024 (1966).

<sup>114</sup> Note 41 *supra*.

<sup>115</sup> See Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 37 (1938).

<sup>116</sup> F. WOODWARD, *QUASI CONTRACTS* § 438 (1913).

<sup>117</sup> *RESTATEMENT OF RESTITUTION*, General Scope Note at 1-2 (1936); Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 40 (1938).

pendent of, but paralleling, quasi-contract,<sup>118</sup> to accomplish the same end, the prevention of unjust enrichment. Thus it is almost axiomatic that the two be considered together.<sup>119</sup> Professors Seavey and Scott have said:

That there is no fundamental difference between the restitutional rights enforced at law and those enforced in equity can be demonstrated only by a comparison of the cases; such a comparison indicates that the principles used by both Courts are the same, although for various reasons a suitor may not be able to get into one of the Courts or, because of procedural reasons, he may obtain less in one than in the other.<sup>120</sup>

At the time the *Restatement of Restitution* was published in 1936, there was still some reluctance on the part of the courts to accept a fusion of legal and equitable remedies, despite procedural reforms theoretically merging the two concepts.<sup>121</sup> Such hesitation is neither reasonable nor advantageous. As Professors Seavey and Scott persuasively argue:

It may be that for many purposes it is desirable still to keep distinct the functions of the two Courts [law and equity], but certainly it is not rational, except so far as differences in procedure require it, and they seldom do, for two co-ordinate Courts in the same jurisdiction to reach different results upon the same set of facts. A statement of rules stated to be applicable to both will have a tendency to lessen the few remaining differences.<sup>122</sup>

Recent courts have generally agreed with this reasoning—perhaps the best statement appearing in *Anderson v. Bell*.<sup>123</sup> “It may well be said that we have but one system of law, consisting of the common law, insofar as applicable, statute law, and principles of equity . . . .’ ‘In reality the distinction between the two classes of remedies is more or less arbitrary and groundless.’”<sup>124</sup> There seems to be little current argument in this country concerning the coalescence of legal and equitable remedies in restitution, and the situation is summarized in cogent form by one recent writer:

Thus the two independently developed means of preventing unjust enrichment—quasi-contracts on the one hand, and equitable restitution by means of constructive trusts, accounting, subrogation, etc., on the other—are [all] gradually drawn together by procedural reforms, interborrowing of theory, and combined textual treatments. It is here that can be observed the continuing synthesis of the modern law of Restitution.<sup>125</sup>

<sup>118</sup> Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 14-15 (1888); Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 MO. L. REV. 223, 229 (1936); York, *Extension of Restitutional Remedies in the Tort Field*, 4 U.C.L.A.L. REV. 499, 510, 548 (1957).

<sup>119</sup> See Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 MO. L. REV. 223, 229 (1936).

<sup>120</sup> Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 39 (1938).

<sup>121</sup> McCleary, *Damage as Requisite to Rescission for Misrepresentation*, 36 MICH. L. REV. 1 (1937); Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 MO. L. REV. 223, 229 (1936); Philpott v. Superior Court, 1 Cal. 2d 512, 514-15, 36 P.2d 635, 636-37 (1934).

<sup>122</sup> Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 40 (1938).

<sup>123</sup> 70 Wyo. 471, 251 P.2d 572 (1952).

<sup>124</sup> *Id.* at 485, 251 P.2d at 576, quoting Urbach v. Urbach, 52 Wyo. 207, 244, 73 P.2d 953, 960 (1937), and Philpott v. Superior Court, 1 Cal. 2d 512, 515, 36 P.2d 635, 637 (1934).

<sup>125</sup> York, *Extension of Restitutional Remedies in the Tort Field*, 4 U.C.L.A.L. REV. 499, 548 (1957).



The law of restitution, then, is the law relating to all claims which are founded on the principle of unjust enrichment. Although restitutionary remedies often accomplish different things and apply to a wide variety of situations, there is no reason why the appropriate restitutionary remedy cannot be used in any situation where rules of policy and procedure would allow the plaintiff recovery,<sup>126</sup> whether or not another remedy is available.<sup>127</sup> In this regard, the scope of the category of restitution is still unsettled.<sup>128</sup>

Ideological acceptance of a tripartite classification with one category based on unjust enrichment is only a little more than 3 decades old,<sup>129</sup> and it remains to be seen where the outer limits of the category will be found.<sup>130</sup> For example, some legal writers have advocated the further extension of restitution into the area of tort,<sup>131</sup> while others have argued that the category should be limited to those situations which do not fall within the purview of tort or contract.<sup>132</sup> It would appear that only time and experience can determine the scope of the category of restitution. In any event, it cannot be denied that such a category of law does exist and has received substantial acceptance in the American legal system.<sup>133</sup>

### Terminology of Restitution

Of the terms used in connection with the subject of restitution, "assumpsit" is one of the oldest<sup>134</sup> and also perhaps one of the most

<sup>126</sup> J. DAWSON, UNJUST ENRICHMENT 112-13 (1951); Wade, *Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183 (1966).

<sup>127</sup> Austin v. Wilcoxson, 149 Cal. 24, 26, 84 P. 417, 417 (1906); Bastanchury v. Times-Mirror Co., 68 Cal. App. 2d 217, 156 P.2d 488 (1945); Glantz v. Freedman, 100 Cal. App. 611, 280 P. 704 (1929); Olwell v. Nye & Nissen Co., 26 Wash. 2d 282, 173 P.2d 652 (1946); Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 YALE L.J. 221 (1910); Keener, *Waiver of Tort*, 6 HARV. L. REV. 223 (1892); Teller, *Restitution as an Alternative Remedy*, 2 N.Y.L.F. 40 (1956); York, *Extension of Restitutional Remedies in the Tort Field*, 4 U.C.L.A.L. REV. 499, 548 (1957).

<sup>128</sup> Fraser, *Introduction to Symposium on the Oklahoma Law of Restitution* 9 OKLA. L. REV. 301 (1956); see York, *Extension of Restitutional Remedies in the Tort Field*, 4 U.C.L.A.L. REV. 499, 510 (1957).

<sup>129</sup> The *Restatement of Restitution* was published in 1937; see Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175 (1959).

<sup>130</sup> See Fraser, *Introduction to Symposium on the Oklahoma Law of Restitution*, 9 OKLA. L. REV. 301, 302 (1956) (argues for extension of recovery based on unjust enrichment).

<sup>131</sup> Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959); York, *Extension of Restitutional Remedies in the Tort Field*, 4 U.C.L.A.L. REV. 499 (1957); Dawson, Book Review, 38 CORNELL L.Q. 634, 635 (1953).

<sup>132</sup> See R. JACKSON, *THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW* 127 (1936).

<sup>133</sup> 5 R. POUND, *JURISPRUDENCE* 244 (1959); Maudsley, *Restitution in England*, 19 VAND. L. REV. 1123, 1126 (1966); Thurston, *Recent Developments in Restitution: 1940-1947*, 45 MICH. L. REV. 935 (1947); Wade, *Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183 (1966); Wright, *The Study of Law*, 54 L.Q. REV. 185, 195 (1938); Mechem, Book Review, 25 IOWA L. REV. 187 (1939); cf. Deglman v. Guaranty Trust Co., [1954] 3 D.L.R. 785 (Can. 1954).

<sup>134</sup> J. AMES, *LECTURES ON LEGAL HISTORY* 163-66 (1913).

troublesome. Although a great deal of restitutional law developed under the wing of *indebitatus assumpsit*,<sup>135</sup> the term has long since lost its potency, at least in relation to restitution. One cannot help but wonder how much more lucid our law would be today, and how many problems in the area of restitution could have been avoided, had the term been jettisoned years ago. There are two major objections to the term "assumpsit."

First, the word has been used to encompass a huge area of the law<sup>136</sup> and was developed more to facilitate the requirements of common law pleading and jurisdiction than to serve as a subcategory of the law.<sup>137</sup> That is, in order to allow new actions based on unjust enrichment, *assumpsit* was expanded to extend the jurisdiction of the common law courts.<sup>138</sup> Today such devices are unnecessary,<sup>139</sup> and the word, "assumpsit," should be either eliminated or restricted to pure contract actions. "Assumpsit" means to assume or undertake;<sup>140</sup> thus "indebitatus assumpsit" means literally an assumed indebtedness<sup>141</sup>—a meaning which does not seem appropriate to an unjust enrichment action.

Second, *assumpsit* and *indebitatus assumpsit* tend to perpetuate the fallacious connection between contract situations and those dealing with unjust enrichment,<sup>142</sup> a connection which was the result of considering both implied in fact contracts and the so-called implied in law contracts or quasi-contracts under general *assumpsit*.<sup>143</sup> Even those states that have abolished the common law forms of action continue, for the most part, to treat restitution actions as though they were actions on a contract with respect to the statute of limitations,<sup>144</sup> counterclaims or set-offs,<sup>145</sup> assignments of rights of action,<sup>146</sup>

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<sup>135</sup> Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 53, 68-69 (1888).

<sup>136</sup> In addition to its original use in tort (text accompanying note 8 *supra*) "assumpsit" covers contracts (text accompanying notes 9-10 *supra*) as well as quasi-contracts (text accompanying note 11 *supra*). See Laughlin v. Boatman's Nat'l Bank, 354 Mo. 467, 476, 189 S.W.2d 974, 979 (1945).

<sup>137</sup> 7 C.J.S. *Assumpsit* § 9 (1937); Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 33 (1938); see Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 1, 53 (1888).

<sup>138</sup> Lewinsohn, *Contract Distinguished From Quasi Contract*, 2 CALIF. L. REV. 171, 190 (1914).

<sup>139</sup> Under modern code pleading, the plaintiff can generally state the facts and the court will apply the appropriate relief. See, e.g., FED. R. CIV. P. 8(a), 8(e)(1); C.E. CLARK, *A New Federal Civil Procedure*, in *PROCEDURE—THE HANDMAID OF JUSTICE* 51 (1965).

<sup>140</sup> "Assumpsit" is derived from the Latin word "assumere" meaning to assume or undertake. WEBSTER'S NEW INTERNATIONAL DICTIONARY 168 (2d ed. 1951).

<sup>141</sup> "Indebitatus" means indebted. BALLENTINE LAW DICTIONARY 629 (2d ed. 1948).

<sup>142</sup> Note 41 *supra*.

<sup>143</sup> *Indiana Harbor Belt Ry. v. Calumet City*, 391 Ill. 280, 63 N.E.2d 369 (1945).

<sup>144</sup> *Templeton Patents Ltd. v. J.R. Simplot Co.*, 220 F. Supp. 48 (S.D. Idaho 1963); RESTATEMENT OF RESTITUTION § 5 (1936).

<sup>145</sup> RESTATEMENT OF RESTITUTION, § 5, comment b at 23 (1936).

<sup>146</sup> *Id.*

joinder,<sup>147</sup> attachments<sup>148</sup> and survival.<sup>149</sup> Considering the basic difference between contract actions and restitution actions, where the former concern an obligation voluntarily assumed,<sup>150</sup> while the latter concern an obligation imposed by law,<sup>151</sup> the procedural treatment of restitution actions as contract actions is questionable at best. It is suggested that, along with dropping the restitutionary application of the terms "assumpsit" and "indebitatus assumpsit," new procedural rules should be formulated for the restitution actions, divorcing them from contract rules. In accordance with this view, it is also thought that it would be beneficial if legal digests and encyclopedias would index and classify the subject under the unified heading of restitution,<sup>152</sup> rather than under the present diversity of titles.<sup>153</sup>

A second undesirable term is "implied contract." There is little logical or practical justification for its usage in connection with the subject of restitution. The term originally referred to implied in fact contracts.<sup>154</sup> Its later application to unjust enrichment situations was achieved through the use of a fictional promise allowing the new action to be brought under the writ of assumpsit.<sup>155</sup> The notion that there is an implied contract in unjust enrichment situations has had a profound effect on the development of this area of the law.<sup>156</sup> Although perhaps a necessary concept in the beginning, it has caused considerable confusion between contract and restitution<sup>157</sup> and should no longer be retained.

A third term that deserves mention is "money had and received." The term designates a form of action in assumpsit based on a quasi-contractual obligation<sup>158</sup> but is restricted to situations where a per-

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See 1 S. WILLISTON, *CONTRACTS* §§ 1, 1A (Rev. ed. S. Williston & G. Thompson 1936).

<sup>151</sup> See *RESTATEMENT OF RESTITUTION* § 1 (1936).

<sup>152</sup> Seavey, *Problems in Restitution*, 7 OKLA. L. REV. 257 (1954) ("Restitution is a term unknown to legal treatises, encyclopedias and digests . . .").

<sup>153</sup> In *Corpus Juris Secundum*, for example, the major indexing titles for restitutionary actions are: 7 C.J.S. *Assumpsit* § 9 (1937); 17 C.J.S. *Contracts* § 6 (1963); 58 C.J.S. *Money Received* §§ 1-33 (1948). Also see C.J.S. *General Index R-Z* at 245-47 (1960).

<sup>154</sup> See Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 1, 53-54 (1888).

<sup>155</sup> J. AMES, *LECTURES ON LEGAL HISTORY* 163 (1913); see *General Accident Fire & Life Assur. Corp. v. Bergquist*, 15 Wis. 2d 166, 111 N.W.2d 900 (1961).

<sup>156</sup> The primary effect has been that the action is treated procedurally as a contract action. Notes 144-49 *supra*.

<sup>157</sup> Note 41 *supra*.

<sup>158</sup> "The action for money had and received was invented by the common-law judges to secure relief from the narrower restrictions of the common-law procedure, which afforded no remedy in too many cases of merit. The action is a modified form of assumpsit. It has gone through various transformations; first, from tort, then from contract, and afterwards into a remedy where there was technically neither tort nor contract. It is founded on the principle that no one ought unjustly to enrich himself at the expense of another, and the gist of the action is that the defendant has received money which in equity and good conscience should have been paid to the plaintiff,

son has been unjustly enriched by the retention of money or its equivalent.<sup>159</sup> The difficulty is that there has been an unfortunate tendency by the courts to use the terms quasi-contract, implied contract and indebitatus assumpsit, in addition to money had and received in discussing the same type of fact situation.<sup>160</sup> This duplication is unnecessary and confusing.<sup>161</sup> In light of the need for a modern terminology of restitution, use of the term "money had and received" should be reconsidered.

### Quasi-Contract, Unjust Enrichment and Restitution

A more difficult task is clarifying the meaning and usage of the terms "quasi-contract," "unjust enrichment," and "restitution." There is considerable disagreement as to what the terms themselves mean, and what, if any, distinctions exist between them.

The most modern manifestation of this confusion has been the statement in a handful of cases since the *Restatement of Restitution* to the effect that the terms "restitution" and "unjust enrichment" are the modern designation for the older doctrine of "quasi-contract."<sup>162</sup> While it might be argued that unjust enrichment is syn-

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and under such circumstances that he ought, by the ties of natural justice, to pay it over." Seekamp v. Small, 39 Wash. 2d 578, 584, 237 P.2d 489, 493 (1951), quoting Bosworth v. Wolfe, 146 Wash. 615, 623-24, 264 P. 413, 417 (1928); accord, Herrmann v. Gleason, 126 F.2d 936 (6th Cir. 1942); Board of Trustees v. Village of Glen Ellyn, 337 Ill. App. 183, 85 N.E.2d 473 (1949); King County v. Odman, 8 Wash. 2d 32, 111 P.2d 228 (1941); Arjay Inv. Co. v. Kohlmetz, 9 Wis. 2d 535, 101 N.W.2d 700, 702 (1960) (where the court states that to fit the theory of quasi-contract into the old forms of action, it was called money had and received); Federal Corp. v. Radtke, 229 Wis. 231, 281 N.W. 921 (1938); see 58 C.J.S. *Money Received* § 1 (1948).

<sup>159</sup> Canepa v. Sun Pac. Inc., 126 Cal. App. 2d 706, 272 P.2d 860 (1954).

<sup>160</sup> Herrmann v. Gleason, 126 F.2d 936 (6th Cir. 1942); Austin v. Wilcoxson, 149 Cal. 24, 26, 84 P. 417, 417 (1906); King County v. Odman, 8 Wash. 2d 32, 111 P. 2d 228 (1941); Bosworth v. Wolfe, 146 Wash. 615, 264 P. 413 (1928); Federal Corp. v. Radtke, 229 Wis. 231, 281 N.W. 921 (1938).

<sup>161</sup> "[I]n the *Restatement* [we find] the perpetuation of the time-worn nomenclature, the quasi-contractual remedies . . . . Is this inevitable? One can find the underlying principle of all these remedies, and draw up a classification which emphasizes those situations where unjust enrichment occurs and where it is or ought to be remedied; but if, because of the precedents, the remedies have to retain their old names, the chains of the past remain to distract and sometimes confuse." Waters, *The English Constructive Trust: A Look into the Future*, 19 VAND. L. REV. 1215, 1219 (1966). Herrmann v. Gleason, 126 F.2d 936, 939 (6th Cir. 1942) (confusing discussion using the terms "assumpsit," "implied in law contract," "quasi-contract," "money had and received" and "restitution"); Wilson Cypress Co. v. Atlantic Coast Line R.R., 109 F.2d 623 (5th Cir.), cert. denied, 310 U.S. 653 (1940) (after dismissal of earlier action in restitution, plaintiff brought action for money had and received which was properly dismissed by the court as res judicata); Ripling v. Superior Court, 112 Cal. App. 2d 399, 247 P.2d 117 (1952) (dispute between parties on right to jury trial).

<sup>162</sup> Gladowski v. Felczak, 346 Pa. 660, 31 A.2d 718 (1943); Bill v. Gattarara, 34 Wash. 2d 645, 209 P.2d 457 (1949); Hixon v. Allphin, 76 Idaho 327, 281 P.2d 1042 (1955); Smith v. Stowell, 256 Iowa 165, 125 N.W.2d 795 (1964); Martin v. Bozeman, 173 So. 2d 382 (La. App. 1965); Guldberg v. Greenfield, — Iowa —, 146 N.W.2d 298 (1966).

onymous with restitution, there seems to be little basis for considering quasi-contract the same as the other two. Specifically, quasi-contract, since its inception, has been limited to actions at law,<sup>163</sup> while restitution and unjust enrichment have, at least since the *Restatement of Restitution*, included both legal and equitable remedies.<sup>164</sup>

An analysis of the cases in which the above statement has appeared sheds additional light on the problem. The Pennsylvania Supreme Court, in *Gladowski v. Felczak*, decided in 1943,<sup>165</sup> first expressed the idea that the terms "restitution," "unjust enrichment" and "quasi-contract" are synonymous: "This case involves the application of the doctrines of 'unjust enrichment' and 'restitution'—modern terms of legal nomenclature which have come largely to supplant the former designation of 'quasi-contract.'"<sup>166</sup> No authority was cited for this statement, and it would appear that there was none. Unfortunately the statement was not explained, and it would appear that the idea expressed therein was not necessary to the holding in the case, so that in addition to being unfounded in logic or precedent, the statement was dictum. In defense of the court, though, the case was decided only 7 years after the *Restatement of Restitution* was published,<sup>167</sup> and the classification and terminology expressed in the *Restatement* were still relatively new to the American legal profession. The court relied on the *Restatement* in finding an equitable lien on real property,<sup>168</sup> and one of the *Restatement* sections quoted in the case does use the terms, "restitution" and "unjust enrichment" to cover a quasi-contractual situation.<sup>169</sup>

Six years later a similar statement was used in *Bill v. Gattavara*.<sup>170</sup> In dictum, the court stated "the terms 'restitution' and 'unjust enrichment' are the modern designations for the older doctrine of 'quasi contracts.'"

*Hixon v. Allphin*<sup>171</sup> then made a similar statement, quoting *Bill v. Gattavara* and citing *Corpus Juris* which does not support it.<sup>172</sup> *Corpus Juris Secundum*, however, adopted the statement, citing *Hixon v. Allphin* and *Bill v. Gattavara*.<sup>173</sup> Nine years later, in *Smith v. Stowell*,<sup>174</sup> the statement was made that "[r]estitution' and 'unjust enrichment' are modern designations for the older doctrine of quasi contracts or contracts implied in law, sometimes called constructive contracts."<sup>175</sup> The court cited *City of Pella v. Fowler*<sup>176</sup> as author-

<sup>163</sup> *Independent School Dist. v. City of White Bear Lake*, 208 Minn. 29, 35, 292 N.W. 777, 781 (1940).

<sup>164</sup> *Anderson v. Bell*, 70 Wyo. 471, 251 P.2d 572 (1952).

<sup>165</sup> 346 Pa. 660, 31 A.2d 718 (1943).

<sup>166</sup> *Gladowski v. Felczak*, 346 Pa. 660, 661, 31 A.2d 718, 719 (1943).

<sup>167</sup> The *Restatement of Restitution* was first published in 1937.

<sup>168</sup> *Gladowski v. Felczak*, 346 Pa. 660, 663, 31 A.2d 718, 720 (1942).

<sup>169</sup> *RESTATEMENT OF RESTITUTION* § 43 (1937).

<sup>170</sup> 34 Wash. 2d 645, 650, 209 P.2d 457, 460 (1949).

<sup>171</sup> 76 Idaho 327, 281 P.2d 1042 (1955).

<sup>172</sup> *Id.* at 333, 281 P.2d at 1045; 66 C.J. *Unjust Enrichment* at 32 (1934) (unjust enrichment is the foundation for most quasi-contracts).

<sup>173</sup> 17 C.J.S. *Contracts* § 6, at 571 (1963). See also 46 AM. JUR. *Restitution and Unjust Enrichment* at 13 (Supp. 1967).

<sup>174</sup> 256 Iowa 165, 125 N.W.2d 795 (1964).

<sup>175</sup> *Id.* at 173, 125 N.W.2d at 799-800.

<sup>176</sup> 215 Iowa 90, 244 N.W. 734 (1932).

ity; however, the *Fowler* case does not support this statement.<sup>177</sup> The following year, a similar expression was made in *Martin v. Boze-man*,<sup>178</sup> relying on *Corpus Juris Secundum*.<sup>179</sup> Finally in *Guldberg v. Greenfield*,<sup>180</sup> the court said, "restitution" and "unjust enrichment" are modern designations for the older terms of "quasi contracts" or contracts implied in law."<sup>181</sup>

It is interesting to note that all of the statements made were dicta and that while later courts do cite some of the above cases on other points, the statement that restitution, unjust enrichment and quasi-contract are synonymous has not been repeated.<sup>182</sup>

Two additional examples of the misuse of the terms "quasi-contract," "unjust enrichment" and "restitution" are of interest. In *Rice v. Wheeling Dollar Savings & Trust Co.*,<sup>183</sup> decided in 1951, an Ohio court said, "[q]uasi-contracts are most often implied in situations involving unjust enrichment or restitution."<sup>184</sup> Does the court mean that unjust enrichment and restitution are synonymous, or that they are different and alternative grounds upon which a quasi-contract can be based? In *Frank v. Tavares*,<sup>185</sup> a 1956 California District Court of Appeal case, the court affirmed plaintiff's recovery below on the theory of an oral contract, but said "[the facts come] well within the doctrine of quasi contract."<sup>186</sup> The court later referred to recovery "upon a theory of quasi-contract or unjust enrichment . . ."<sup>187</sup> Apparently the court considered quasi-contract and unjust enrichment as alternative theories. Since a "theory" is "[t]he basis of liability or grounds of defense,"<sup>188</sup> and unjust enrichment is generally accepted as the basis of the quasi-contract action,<sup>189</sup> unjust enrichment and quasi-contract cannot be alternative theories.

In a more recent California case, *Branche v. Hetzel*,<sup>190</sup> it was said that "[t]he principle of unjust enrichment is related to the subject of restitution and forms the basis for the right to restitution upon a

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<sup>177</sup> The case is authority only for the proposition that quasi-contracts rest on the equitable principle that one shall not be permitted to unjustly enrich himself at the expense of another.

<sup>178</sup> 173 So. 2d 382 (La. App. 1965).

<sup>179</sup> *Id.* at 386. 17 C.J.S. Contracts § 6 (1963).

<sup>180</sup> — Iowa —, 146 N.W.2d 298 (1966).

<sup>181</sup> *Id.* at 305.

<sup>182</sup> *Lipinski v. Columbus Plaza, Inc.*, 225 A.2d 36, 40 (Conn. Cir. Ct. 1966) (citing *Hixon v. Allphin*); *Rice v. Wheeling Dollar Sav. & Trust Co.*, 155 Ohio St. 391, 396, 99 N.E.2d 301, 304 (1951) (citing *Bill v. Gattavara*); *Binns v. First Nat'l Bank*, 367 Pa. 359, 372, 80 A.2d 768, 776 (1951) (citing *Gladowski v. Felczak*); *Lauffer v. Vial*, 153 Pa. Super. 342, 346, 33 A.2d 777, 779 (1943) (citing *Gladowski v. Felczak*).

<sup>183</sup> *Rice v. Wheeling Dollar Sav. & Trust Co.*, 155 Ohio St. 391, 99 N.E.2d 301 (1951).

<sup>184</sup> *Id.* at 396, 99 N.E.2d at 304.

<sup>185</sup> *Frank v. Tavares*, 142 Cal. App. 2d 683, 298 P.2d 887 (1956).

<sup>186</sup> *Id.* at 688, 298 P.2d at 890.

<sup>187</sup> *Id.* at 688-89, 298 P.2d at 890.

<sup>188</sup> BLACK'S LAW DICTIONARY 1649 (4th ed. 1951).

<sup>189</sup> See, e.g., RESTATEMENT OF RESTITUTION § 1 (1936).

<sup>190</sup> 241 Cal. App. 2d 801, 51 Cal. Rptr. 188 (1966).

quasi-contractual theory of recovery."<sup>191</sup> Despite a possible misuse of the word "theory," the statement in *Branche v. Hetzel* shows an appreciation of the basic concepts involved.

It is nevertheless apparent from these cases that the meaning of the terms "quasi-contract," "unjust enrichment" and "restitution" is unclear and further consideration of these terms by legal writers and the courts is needed.

### Title for the Category

The major problem in terminology is in naming the category of law dealing with unjust enrichment. First to be considered is the term "quasi-contract," given general currency as a category of the American law by Keener in 1896,<sup>192</sup> and supported, to some extent, through the ensuing decades.<sup>193</sup> The term "quasi-contract" was originally taken from Roman law where it named a category of the law divided into five parts, each having an affinity with some type of contract.<sup>194</sup> In fact, the word "quasi" means like or analogous to,<sup>195</sup> so the term "quasi-contract" is intrinsically related to contract. In the American legal system, the term means an action at law for the prevention of unjust enrichment.<sup>196</sup> Recovery is determined largely on equitable principles;<sup>197</sup> however, the action is at law<sup>198</sup> and the equitable remedies also based on unjust enrichment are not generally considered within the scope of quasi-contract.<sup>199</sup>

It has also been contended that recovery in quasi-contract may be based on other grounds than unjust enrichment.<sup>200</sup> For example, Keener included a statutory, official or customary duty and a record or judgment as bases of the remedy.<sup>201</sup> The Keener position is difficult to maintain, as mentioned earlier,<sup>202</sup> and for the purpose of de-

<sup>191</sup> *Id.* at 807, 51 Cal. Rptr. at 192.

<sup>192</sup> 5 R. POUND, JURISPRUDENCE 243 (1959).

<sup>193</sup> H. LAUBE, CASES ON QUASI-CONTRACTS (1933); S. STOLJAR, QUASI-CONTRACT 1 (1964); P. WINFIELD, QUASI-CONTRACTS (1952); Hand, *Restitution or Unjust Enrichment*, 11 HARV. L. REV. 249 (1898).

<sup>194</sup> 2 BOUVIER'S LAW DICTIONARY 2781 (3d ed. 1914).

<sup>195</sup> BLACK'S LAW DICTIONARY 1410 (4th ed. 1951); 74 C.J.S. *Quasi* at 2 (1951).

<sup>196</sup> *Frank v. Tavares*, 142 Cal. App. 2d 683, 688-89, 298 P.2d 887, 890-91 (1956); W. KEENER, QUASI-CONTRACTS 14-16 (1893); F. WOODWARD, QUASI CONTRACTS 2 (1913).

<sup>197</sup> *Westgate v. Maryland Cas. Co.*, 147 F.2d 177, 180 (6th Cir. 1945); *Roske v. Ilykanyics*, 232 Minn. 383, 389, 45 N.W.2d 769, 774 (1951); *Arjay Inv. Co. v. Kohlmetz*, 9 Wis. 2d 535, 538, 101 N.W.2d 700, 702 (1960).

<sup>198</sup> *Roske v. Ilykanyics*, 232 Minn. 383, 389, 45 N.W.2d 769, 774 (1951); *Arjay Inv. Co. v. Kohlmetz*, 9 Wis. 2d 535, 538, 101 N.W.2d 700, 702 (1960); F. WOODWARD, QUASI CONTRACTS 2 (1913); Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 38 (1938).

<sup>199</sup> F. WOODWARD, QUASI CONTRACTS § 6, at 8 (1913).

<sup>200</sup> S. STOLJAR, QUASI-CONTRACT 2-5 (1964), suggests that there is an underlying disagreement between the traditionalists who base quasi-contracts on an implied contract, and the modernists who base the action on unjust enrichment. See W. KEENER, QUASI-CONTRACTS 16 (1893); 1 S. WILLISTON, CONTRACTS § 3(a) (3d ed. 1957).

<sup>201</sup> W. KEENER, QUASI-CONTRACTS 16 (1893).

<sup>202</sup> Note 24 *supra*; see Abbot, *Keener on Quasi-Contracts*, 10 HARV. L. REV. 209, 212-15 (1896).

fining quasi-contract in this comment, unjust enrichment will be considered the sole basis of the obligation. Professor Williston maintains that the law will sometimes impose a duty to restore the plaintiff to his former position, rather than merely demand surrender of the benefit the defendant has received and as such, the basis of the obligation is not unjust enrichment.<sup>203</sup> At first glance, this may seem to be a valid objection, but a careful analysis reveals that even if the defendant may sometimes be under a quasi-contractual duty to restore the plaintiff to his former position and not merely to surrender any benefit he may have received, the basis of the obligation remains unjust enrichment. Professor Williston concedes that the actual amount of recovery is usually the same in both instances,<sup>204</sup> and it would seem that in the former case if the defendant had not been unjustly enriched, the action would not be maintainable. The fact that the plaintiff may sometimes recover more or less than the amount by which the defendant was enriched merely indicates that the courts are applying equitable principles in coming to a just result.

Despite repeated criticism,<sup>205</sup> the term "quasi-contract" seems well established in both the English and American legal systems,<sup>206</sup> and it would be difficult to dislodge it now, even though such a change would be desirable. The principal criticism of the term is its connection to contract,<sup>207</sup> and although this connection has been occasionally defended,<sup>208</sup> it seems clear that it is fallacious and has

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<sup>203</sup> 1 S. WILLISTON, *CONTRACTS* § 3 (3d ed. W. Jaeger 1957).

<sup>204</sup> *Id.* § 30.

<sup>205</sup> P. WINFIELD, *TORTS* 8 (1937); Abbot, *Keener on Quasi-Contracts*, 10 HARV. L. REV. 209 (1896); Corbin, *Quasi-Contractual Obligations*, 21 YALE L.J. 533, 544 (1912); Seavey, *Problems in Restitution*, 7 OKLA. L. REV. 257 (1954).

<sup>206</sup> In English law: *E.g.*, *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32, 61 (1943); *Degelman v. Guaranty Trust Co.*, [1954] 3 D.L.R. 785 (Can. 1954); DICEY'S *CONFLICT OF LAWS* 927 (7th ed. J. Morris ed. 1958); see S. STOLJAR, *QUASI-CONTRACT* 1 (1964). In American law: see, *e.g.*, *Rosenkoff v. Finkelstein*, 195 F.2d 203 (D.C. Cir. 1952); *Matarese v. Moore-McCormack Lines*, 158 F.2d 631 (2d Cir. 1946); *Herrmann v. Gleason*, 126 F.2d 936 (6th Cir. 1942); *Cawthon v. Bancokentucky Co.*, 52 F.2d 850 (W.D. Ky. 1931); *Shanks v. Wilson*, 86 F. Supp. 789 (S.D. W. Va. 1949); *Ward v. Taggart*, 51 Cal. 2d 736, 336 P.2d 534 (1959); *Branche v. Hetzel*, 241 Cal. App. 2d 801, 51 Cal. Rptr. 188 (1966); *Frank v. Tavares*, 142 Cal. App. 2d 683, 298 P.2d 887 (1956); *Indiana Harbor Belt Ry. v. Calumet City*, 391 Ill. 280, 63 N.E.2d 369 (1945); *Board of Trustees v. Village of Glen Ellyn*, 337 Ill. App. 183, 85 N.E.2d 473 (1949); *Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 104 N.W.2d 843 (1960); *Independent School Dist. v. City of White Bear Lake*, 208 Minn. 29, 292 N.W. 777 (1940); *Mehl v. Norton*, 201 Minn. 203, 275 N.W. 843 (1937); *Laughlin v. Boatman's Nat'l Bank*, 254 Mo. 467, 189 S.W.2d 974 (1945); *West Caldwell v. Caldwell*, 26 N.J. 9, 138 A.2d 402 (1958); *City of Cincinnati v. Fox*, 71 Ohio App. 233, 49 N.E.2d 69 (1943); *In re Farmers Bank of Amherst*, 67 S.D. 51, 289 N.W. 75 (1939); *King County v. Odman*, 8 Wash. 2d 32, 111 P.2d 228 (1941); *General Accident Fire & Life Assur. Corp. v. Bergquist*, 15 Wis. 2d 166, 111 N.W.2d 900 (1961); *Arjay Inv. Co. v. Kohlmetz*, 9 Wis. 2d 535, 101 N.W.2d 700 (1960); *Federal Corp. v. Radtke*, 229 Wis. 231, 281 N.W. 921 (1938).

<sup>207</sup> 3 A. SCOTT, *TRUSTS* § 461, at 2312 (1939); Abbot, *Keener on Quasi-Contracts*, 10 HARV. L. REV. 209 (1896); Corbin, *Quasi-Contractual Obligations*, 21 YALE L.J. 533, 544 (1912).

<sup>208</sup> R. GOFF & G. JONES, *RESTITUTION* 3 (1966); Holdsworth, *Unjustifiable*



caused considerable confusion in the courts.<sup>209</sup> A further objection to the term as a title for the category of law based on unjust enrichment is the fact that quasi-contract has been confined to an action at law<sup>210</sup> and has never included the equitable restitutionary remedies.<sup>211</sup> For these reasons the term was rejected as a class heading in the *Restatement of Restitution*,<sup>212</sup> and this conclusion seems equally valid today.

## Unjust Enrichment

The term "unjust enrichment" has been suggested to form both the basis of action within the third category of law<sup>213</sup> and the category name itself.<sup>214</sup> Breaking the term "unjust enrichment" down, the word "unjust" connotes a moral judgment and, as such, cannot be precisely defined,<sup>215</sup> while the word "enrichment" is a specific fact and might be defined as the receipt of something of value.<sup>216</sup> Unjust enrichment has been defined as the doctrine that a person shall not be allowed to profit or enrich himself inequitably at another's expense.<sup>217</sup>

It is difficult to make very strenuous objections to the term

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*Enrichment*, 55 L.Q. REV. 37 (1939); Corbin, *Quasi-Contractual Obligations*, 21 YALE L.J. 533, 544 (1912); see R. JACKSON, *THE HISTORY OF QUASI-CONTRACTS IN ENGLISH LAW* 127 (1936).

<sup>209</sup> Note 41 *supra*.

<sup>210</sup> Note 198 *supra*.

<sup>211</sup> Note 199 *supra*.

<sup>212</sup> Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 39 (1938).

<sup>213</sup> RESTATEMENT OF RESTITUTION § 1 (1937); Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 MO. L. REV. 223, 228 (1936); see Frank v. Tavares, 142 Cal. App. 2d 683, 689, 298 P.2d 890-91 (1956).

<sup>214</sup> J. DAWSON, *UNJUST ENRICHMENT* (1951) (suggested by book title); Friedmann, *The Principle of Unjust Enrichment in English Law*, 16 CAN. B. REV. 365, 366 (1938); Jackson, *The Restatement of Restitution*, 10 MISS. L.J. 95, 96 (1938); Mechem, Book Review, 25 IOWA L. REV. 187, 188 (1939); Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 MO. L. REV. 223, 228 (1936); see Westgate v. Maryland Cas. Co., 147 F.2d 177 (6th Cir. 1945); Buell v. Orion State Bank, 327 Mich. 43, 41 N.W.2d 472 (1950); General Accident Fire & Life Assur. Corp. v. Bergquist, 15 Wis. 2d 166, 111 N.W.2d 900 (1961); Arjay Inv. Co. v. Kohlmetz, 9 Wis. 2d 535, 101 N.W.2d 700 (1960).

<sup>215</sup> Words have no inherent meaning; that is, they are symbols that signify an impression arbitrarily assigned to them and have no "natural" meaning. Williams, *The Language and the Law*, 61 L.Q. REV. 71, 384 (1945). Professor Powell has argued that nothing is gained by defining words, 9 PROCEEDINGS, AMERICAN LAW INSTITUTE 122 (1934), and it has also been said that precise definitions of words tend to inhibit growth. See Cairns, *Note on Legal Definitions*, 36 COLUM. L. REV. 1099, 1100 (1936). Nevertheless, the ambiguity of the English language would seem to require at least general definitions of words used in the law, and precise definitions would not inhibit growth if the legal profession were not so reluctant to adopt a new word. In any event, word definitions are merely short forms of rules or a series of rules, so the longer the rule, or the more rules for which the word purports to stand, the less useful the definition. Cairns, *supra* at 1103. Thus, in the case of a term like "unjust enrichment" no precise definition will be attempted. See also 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 481 (1923).

<sup>216</sup> BLACK'S LAW DICTIONARY 1705 (4th ed. 1951).

<sup>217</sup> RESTATEMENT OF RESTITUTION § 1 (1936).

"unjust enrichment" as a category heading. One objection to the term as a heading is the fact that some cases involving unjust enrichment go without legal redress.<sup>218</sup> Words signifying a title for a category of law are defined by a series of rules,<sup>219</sup> and if those rules exclude recovery in some circumstances where there has been unjust enrichment, then "unjust enrichment" should not be used to name the class. Although an analogous objection and argument could be applied to the term "contract" as a category of law, since there are some contracts that are not enforced, this does not refute the argument as applied to unjust enrichment.

The authors of the *Restatement of Restitution* do not explain why they preferred the term "restitution" and Professor Seavey, in fact, said "[p]erhaps unjust enrichment would be a better term."<sup>220</sup> It is felt that any rejection of the term has been because of a general feeling of inappropriateness rather than any logical objection. The term "unjust enrichment" has not, however, been uniformly rejected as a category heading. One of the advisors on the *Restatement of Restitution* seems to prefer the term, but does not present any arguments for or against its use.<sup>221</sup> Professor Jackson severely criticizes both the terminology and classification of the *Restatement* and suggests an alternative category called "unjust enrichment" without presenting any reasons for his preference.<sup>222</sup> Professor Friedmann, writing shortly after the *Restatement* was published, seems to accept without argument the term "unjust enrichment" as the heading for the category of law titled "restitution" by the *Restatement*.<sup>223</sup> Professor Mechem, in reviewing a casebook on restitution, said that the *Restatement of Restitution* is really a restatement of a law of unjust enrichment.<sup>224</sup> While not specifically discussing terminology, Professor Dawson apparently titles the category of law in question unjust enrichment.<sup>225</sup> In addition, there are a number of cases that use the term "unjust enrichment" in such a way as to suggest that it is preferred as the title of the third category of law.<sup>226</sup>

## Restitution

The third term to consider as a heading for the category of law based on unjust enrichment is "restitution." In its specific

<sup>218</sup> S. STOLJAR, QUASI-CONTRACT 1 (1964); see Takeuchi v. Schmuck, 206 Cal. 782, 276 P. 345 (1929); Haas v. Greenwald, 196 Cal. 236, 237 P. 38 (1925); Bierman v. Hagstrom Constr. Co., 176 Cal. App. 2d 771, 1 Cal. Rptr. 826 (1959).

<sup>219</sup> Note 215 *supra*.

<sup>220</sup> Seavey, *Problems in Restitution*, 7 OKLA. L. REV. 257 (1954).

<sup>221</sup> See Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 MO. L. REV. 223 (1936).

<sup>222</sup> Jackson, *The Restatement of Restitution*, 10 MISS. L.J. 95, 96 (1938).

<sup>223</sup> Friedmann, *The Principle of Unjust Enrichment in English Law*, 16 CAN. B. REV. 365, 366 (1938).

<sup>224</sup> Mechem, Book Review, 25 IOWA L. REV. 187, 188 (1939).

<sup>225</sup> J. DAWSON, UNJUST ENRICHMENT (1951).

<sup>226</sup> Westgate v. Maryland Cas. Co., 147 F.2d 177 (6th Cir. 1945); State v. Martin, 59 Ariz. 438, 130 P.2d 48 (1942); Lipinski v. Columbus Plaza, Inc., 225 A.2d 36 (Conn. Cir. Ct. 1966); Powell v. Sheets, 196 Ore. 682, 251 P.2d 108 (1952); General Casmir Pulaski Bldg. & Loan Ass'n v. Provident Trust Co., 338 Pa. 198, 12 A.2d 336 (1940).

sense, the word means the return of something to its rightful owner.<sup>227</sup> It also has a broad meaning covering an entire category of the law based on unjust enrichment.<sup>228</sup> This category is based on the premise that a person has the right to be protected against the unjust enrichment of another at his expense.<sup>229</sup> Thus whatever word is used as the category title must be similarly defined, so that restitution when used in this sense is the right to legal redress when another has been unjustly enriched at one's expense. The term has been used, however, in a number of ways. Originally restitution was a writ available to recover property paid over on a judgment, when the judgment was subsequently reversed.<sup>230</sup> Today the term is loosely used as in "action,"<sup>231</sup> "suit,"<sup>232</sup> "claim,"<sup>233</sup> "doctrine,"<sup>234</sup> "theory,"<sup>235</sup> "principle,"<sup>236</sup> and "remedy."<sup>237</sup>

<sup>227</sup> BLACK'S LAW DICTIONARY 1477 (4th ed. 1951); 46 AM. JUR. *Restitution and Unjust Enrichment* at 99 (1943); see *Holloway v. People's Water Co.*, 100 Kan. 414, 167 P. 265 (1917).

<sup>228</sup> RESTATEMENT OF RESTITUTION (1936) (as suggested by the title); Seavy & Scott, *Restitution*, 54 L.Q. REV. 29, 29-31 (1938).

<sup>229</sup> RESTATEMENT OF RESTITUTION § 1 (1936).

<sup>230</sup> See *Holloway v. People's Water Co.*, 100 Kan. 414, 167 P. 265 (1917); *Haebler v. Myers*, 132 N.Y. 363, 30 N.E. 963 (1892); *Lytle v. Payette-Oregon Slope Irr. Dist.*, 175 Ore. 276, 152 P.2d 934 (1944); 46 AM. JUR. *Restitution and Unjust Enrichment* at 99 (1943).

<sup>231</sup> See *Slater v. Gulf, M. & O. R.R.*, 307 N.Y. 419, 121 N.E.2d 398 (1954); *National Maritime Union v. Taystee Bar-B-Q Corp.*, 192 Pa. Super. 362, 161 A.2d 646 (1960); *Home Sav. Bank v. General Fin. Corp.*, 10 Wis. 2d 417, 103 N.W.2d 117 (1960).

<sup>232</sup> See *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301 (1935); *Greenwood County v. Duke Power Co.*, 107 F.2d 484 (4th Cir. 1939); 5 S. WILLISTON, *CONTRACTS* § 4038 at 1444A (Rev. ed. S. Williston & G. Thompson 1936).

<sup>233</sup> See *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301 (1935); *Harriman v. Tetik*, 56 Cal. 2d 805, 17 Cal. Rptr. 134, 366 P.2d 486 (1961).

<sup>234</sup> See *Duke Power Co. v. Greenwood County*, 25 F. Supp. 419 (W.D.S.C. 1938); *Milman v. Denniston*, 271 App. Div. 988, 68 N.Y.S.2d 325 (1947); *Estate of Buereton*, 388 Pa. 206, 130 A.2d 453 (1957); *National Maritime Union v. Taystee Bar-B-Q Corp.*, 192 Pa. Super. 362, 161 A.2d 646 (1960).

<sup>235</sup> See *Barnes v. Eastern & W. Lumber Co.*, 205 Ore. 553, 287 P.2d 929 (1955); *Lauffer v. Vial*, 153 Pa. Super. 342, 33 A.2d 777 (1943); *Home Sav. Bank v. General Fin. Corp.*, 10 Wis. 2d 417, 103 N.W.2d 117 (1960); *Duffy v. Scott*, 235 Wis. 142, 292 N.W. 273 (1940).

<sup>236</sup> *Jersey City v. Hague*, 18 N.J. 584, 115 A.2d 8 (1955); *Binns v. First Nat'l Bank*, 367 Pa. 359, 80 A.2d 768 (1951); 46 AM. JUR. *Restitution and Unjust Enrichment* at 100 (1943); 77 C.J.S. *Restitution* at 322 (1952).

<sup>237</sup> *United States v. Parkinson*, 135 F. Supp. 208 (S.D. Cal. 1955); *General Contract Purchase Corp. v. Clem*, 220 Ark. 863, 251 S.W.2d 112 (1952); *Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish*, 37 Cal. 2d 16, 230 P.2d 629 (1951); *Crofoot Lumber, Inc. v. Thompson*, 163 Cal. App. 2d 324, 329 P.2d 302 (1958); *Jersey City v. Hague*, 18 N.J. 584, 115 A.2d 8 (1955); *Haebler v. Myers*, 132 N.Y. 363, 30 N.E. 963 (1892); *Lytle v. Payette-Oregon Slope Irr. Dist.*, 175 Ore. 276, 152 P.2d 934 (1944); *Baugh v. Darley*, 112 Utah 1, 184 P.2d 335 (1947); *Home Sav. Bank v. General Fin. Corp.*, 10 Wis. 2d 417, 103 N.W.2d 117 (1960); 5 A. CORBIN, *CONTRACTS* 460 (1951); 5 S. WILLISTON, *CONTRACTS* 4038 at § 1444A (Rev. ed. S. Williston & G. Thompson 1936); *BALLENTINE LAW DICTIONARY* 1133 (2d ed. 1948).

When used in connection with doctrine,<sup>238</sup> theory<sup>239</sup> or principle,<sup>240</sup> restitution refers to the title of the category of law based on unjust enrichment, and as such, stands for the *right* of a person not to have another unjustly enriched at his expense. On the other hand, restitution, when used in connection with an action,<sup>241</sup> suit<sup>242</sup> or claim<sup>243</sup> may mean *either* that the plaintiff has a *right*, restitution, which he is enforcing, *or* that the plaintiff demands restitution in its specific sense as the *means* of enforcing his right. In the first of these alternatives, restitution is used as a title and stands for a right, while in the second alternative, restitution is used as a remedy.

The root of the problem lies in the usage of the term "remedy." As defined by *Black's Law Dictionary*, a remedy is "[t]he means by which a right is enforced or the violation of a right is prevented, redressed, or compensated."<sup>244</sup> It has also been said, however, that "[a] remedy is an obligation destined to stand in the place of the plaintiff's rights, and be, as nearly as possible, an equivalent to him for his rights."<sup>245</sup> If remedy is defined as the means by which a right is enforced, use of the word "restitution" as a remedy results in the nonsensical proposition that "restitution" is enforced by "restitution," and it seems clear that one meaning must logically give way to the other.

If, on the other hand, a remedy stands in place of a right and is equal to that right, it is not inconsistent to use restitution as both a remedy and a right. It would appear that the two meanings of the word "remedy" are inconsistent. In the first meaning, remedy regulates only how much will be recovered, the most common example being damages. In the second meaning, remedy involves the determination both as to *when* recovery will be allowed and *how much* will be allowed, an example being conversion.

In conversion the plaintiff must prove such factors as the extent and duration of the defendant's control of the chattel, his intent to assert a right which is inconsistent with the plaintiff's right of control, good or bad intent, harm done to the chattel, and expense or inconvenience to the plaintiff.<sup>246</sup> Once some or all of these factors

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<sup>238</sup> A "doctrine" is "[a] rule, principle, theory, or tenet of the law." BLACK'S LAW DICTIONARY 568 (4th ed. 1951).

<sup>239</sup> A "theory" is "[t]he basis of liability or grounds of defense." *Id.* at 1649.

<sup>240</sup> A "principle" is "[a] fundamental truth or doctrine, as of law; a comprehensive rule or doctrine which furnishes a basis or origin of others." *Id.* at 1357.

<sup>241</sup> An "action" is "[t]he legal and formal demand of one's right from another person or party made and insisted on in a court of justice." *Id.* at 49.

<sup>242</sup> A "suit" is "[p]roceeding by one person or persons against another or others in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity." *Id.* at 1603.

<sup>243</sup> A "claim" is "[t]o demand as one's own; to assert." *Id.* at 313.

<sup>244</sup> *Id.* at 1457.

<sup>245</sup> Hand, *Restitution or Unjust Enrichment*, 11 HARV. L. REV. 249, 256 (1898).

<sup>246</sup> W. PROSSER, TORTS § 15, at 81 (1964).

are established, the right to recovery under conversion exists, and the plaintiff is entitled to recover the value of the chattel.<sup>247</sup> Other than the factual question of what is the actual value of the chattel, the extent of recovery is established at the same time the right of recovery is established. Thus conversion should not be called a remedy if damages is also called a remedy.

It is submitted that the word "remedy" should be confined to the first meaning, that is, a set of rules regulating the amount or kind of recovery, and that the so-called "remedies" of conversion, quasi-contract, or any others that involve rules of when the plaintiff can recover should be considered "actions" or some other appropriate term. For the purpose of this comment, the word "action" has been used for those terms describing the rules regulating when (under what conditions) recovery will be allowed as well as for those that regulate both when and how much recovery will be allowed. Contract, then, is an action, as is conversion, while damages is a remedy.

In the *Restatement of Restitution* the word "restitution" is used both as a remedy and as a title for the third category of law. It is said, "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other."<sup>248</sup> Restitution, when used in this way, indicates that the term stands for the measure of recovery, i.e. a remedy. The *Restatement* goes on, however, to list six remedies which a person may use when he is entitled to restitution,<sup>249</sup> thus implying that restitution is not a remedy, or is a "remedy" in the second sense of the word.

Technically, if "restitution" were used as a remedy, its presently accepted meaning, the regaining of something one once had,<sup>250</sup> would limit any recovery to loss alone. Thus anything other than that which the plaintiff once had might be excluded from the measure of recovery by the intrinsic meaning of the word. However, recovery based on unjust enrichment depends on either loss or benefit.<sup>251</sup> Given that recovery is not necessarily limited to loss alone,<sup>252</sup> it is incorrect to use the term restitution as a remedy.

The objection does not apply, however, when the word is used as an action because the intrinsic limitation of loss refers only to the

<sup>247</sup> *Id.* § 15, at 81-98.

<sup>248</sup> RESTATEMENT OF RESTITUTION § 1 (1937).

<sup>249</sup> *Id.* at § 4 (self help, judgment by court of law enforced by sheriff to seize and restore, decree by court of equity that title or possession be transferred, decree by court of equity of a lien, subrogation, judgment at law or decree in equity for payment of money).

<sup>250</sup> *Fineg v. Pickrell*, 81 Ariz. 313, 320, 305 P.2d 455, 459 (1956); *Holloway v. People's Water Co.*, 100 Kan. 414, 423-24, 167 P. 265, 270 (1917) (states common law meaning in dictum); 46 AM. JUR. *Restitution and Unjust Enrichment* at 99 (1943); BALLENTINE LAW DICTIONARY 1133 (1930). *Contra*, *Basile v. United States*, 38 A.2d 620, 622 (D.C. Mun. Ct. App. 1944); *Fineg v. Pickrell*, *supra*, at 324, 305 P.2d at 462 (dissent); *Holloway v. People's Water Co.*, *supra* (holding); *State v. Barnett*, 110 Vt. 221, 231, 3 A.2d 521, 525 (1939).

<sup>251</sup> W. PROSSER, *TORTS* 644 (3d ed. 1964); 1 S. WILLISTON, *CONTRACTS* § 3 (3rd ed. W. Jaeger 1957); 46 AM. JUR. *Restitution and Unjust Enrichment* at 99 (1943); Fraser, *Introduction to Symposium on the Oklahoma Law of Restitution*, 9 OKLA. L. REV. 301 (1956); Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 37 (1938).

<sup>252</sup> Note 254 *infra*.

right to recover (when recovery will be allowed) and it is a requirement of recovery based on unjust enrichment that the plaintiff have lost something.<sup>253</sup> Having lost something however, he may recover, in some instances, more than he lost if the defendant was unjustly enriched by more than the loss.<sup>254</sup>

In the case of restitution, then, a choice must be made between using the term as a "remedy" or as an "action."<sup>255</sup> The action, being a set of rules determining *when* the plaintiff can recover, may be rather specific and narrow as in conversion, or may be broad enough to include one of the three primary categories of the law.<sup>256</sup> It is submitted that the term "restitution" should be in the latter class, and that when the right of restitution has been established, a new word, such as "reparation"<sup>257</sup> or "expiation,"<sup>258</sup> should be used as the remedy for the action of restitution.

The position taken in this comment that "restitution" should be used as the heading for the third category of the law has considerable support,<sup>259</sup> but is also faced with some opposition.<sup>260</sup> It must be ad-

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<sup>253</sup> RESTATEMENT OF RESTITUTION § 1, comment *a* at 12 (1937).

<sup>254</sup> *Olwell v. Nye & Nissen Co.*, 26 Wash. 2d 282, 173 P.2d 652 (1946); W. PROSSER, *TORTS* 644 (3d ed. 1964); RESTATEMENT OF RESTITUTION § 1, comment *e* at 14-15 (1936); Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 37 (1938); see *Basile v. United States*, 38 A.2d 620, 622 (1944).

<sup>255</sup> Compare Professor Dawson's use of the term "restitution" in the title of his case book, E. DUFFEE & J. DAWSON, *CASES ON REMEDIES II RESTITUTION AT LAW AND EQUITY* (1939), with his later statement that the "law of restitution cuts across all remedies." J. DAWSON, *UNJUST ENRICHMENT* 39 (1951).

<sup>256</sup> No attempt has been made to formalize the procedure beyond a distinction between "action" and "remedy," as any such attempt is not within the scope of this comment. It might be noted, however, that attention to the words "in" and "for" might help provide a clearer understanding of the subject. That is, one would say that the action is brought "in restitution" or "in contract" or "in tort," meaning the broad area of the law under which the plaintiff seeks recovery. One would then say the action is "for the remedy" of "damages," "constructive trust" or "specific performance."

<sup>257</sup> Reparation is the "[a]ct or process of repairing or restoring" or the "[a]ct of making amends or giving satisfaction or compensation for a wrong, injury, etc." WEBSTER'S NEW INTERNATIONAL DICTIONARY 2111 (2d ed. 1951). It has also been defined as "[t]he redress of an injury; amends for a wrong inflicted." BLACK'S LAW DICTIONARY 1462 (4th ed. 1951). Professor Patterson used the word to replace "restitution" as the remedy for unjust enrichment. Patterson, *Improvements in the Law of Restitution*, 40 CORNELL L.Q. REV. 667, 671 (1955). It has also been said that "reparation" is synonymous with "restitution." 77 C.J.S. *Restitution* at 322 (1952).

<sup>258</sup> Expiation is the "[a]ct of making satisfaction or atonement for a crime or fault; . . . the means by which reparation or atonement is made; . . ." WEBSTER'S NEW INTERNATIONAL DICTIONARY 897 (2d ed. 1951).

<sup>259</sup> *Branche v. Hetzel*, 241 Cal. App. 2d 801, 51 Cal. Rptr. 188 (1966); *Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 104 N.W.2d 843 (1960); DICEY'S *CONFLICT OF LAWS* 927 (7th ed. J. Morris ed. 1958); 5 R. POUND, *JURISPRUDENCE* 242 (1959); R. GOFF & G. JONES, *RESTITUTION* (1966); Fraser, *Introduction to Symposium on the Oklahoma Law of Restitution*, 9 OKLA. L. REV. 301 (1956); Macaulay, *Restitution in Context*, 107 U. PA. L. REV. 1133, 1138 (1959); Maudsley, *Restitution in England*, 19 VAND. L. REV. 1123 (1965); Patterson, *Improvements in the Law of Restitution*, 40 CORNELL L.Q. REV. 667 (1955); Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 MO. L. REV. 223 (1936); Seavey, *Problems in Restitution*, 7 OKLA. L. REV. 257

mitted that those writers and courts that have accepted "restitution" as the heading of the third category of the law have done so without, for the most part, comment or argument one way or the other. Dean Pound said "[h]ence the American Law Institute took a step forward in treating the obligation arising from unjust enrichment separately under the appropriate name of Restitution."<sup>261</sup> Lord Wright in a book review of the *Restatement of Restitution* said "[t]he general title Restitution is well chosen but may need explanation."<sup>262</sup> The *Restatement* itself, made no attempt to justify the use of the term restitution as the general title, and the question received only cursory treatment in Professors Seavey and Scott's subsequent article which explained and defended the *Restatement*.<sup>263</sup> Professor Patterson briefly considered the terminology of the subject, but while criticizing all three terms (quasi-contract, unjust enrichment and restitution), he concluded that "[t]here is much to be said for limiting the title to 'Restitution,' a term which has some recognition in judicial opinions."<sup>264</sup>

Perhaps the strongest objection to the *Restatement* terminology was made by Professor Jackson,<sup>265</sup> who objected to the classification of the law into tort, contract and restitution because tort and contract are based on the source of the obligation while he said restitution is based on the remedy.<sup>266</sup> He also argued that the term "restitution" should not include cases of constructive trust, and that the suggested name, restitution, is so vague as to be useless.<sup>267</sup> In the same vein, Professor Logan, in a book review of the *Restatement of Restitution*, discussed and generally agreed with Jackson's criticism of the *Restatement's* classification and terminology.<sup>268</sup> Logan, however, disagreeing with Jackson, argued that the term "restitution" is properly applied to the second section of the *Restatement* which deals with constructive trusts.<sup>269</sup> The basis of this argument is that

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(1954); Seavey & Scott, *Restitution*, 54 L.Q. REV. 29 (1938); Thurston, *Recent Developments in Restitution: 1940-1947*, 45 MICH. L. REV. 935 (1947); Waters, *The English Constructive Trust: A Look into the Future*, 19 VAND. L. REV. 1215 (1966); Dawson, Book Review, 38 CORNELL L.Q. 634, 635 (1953); Wright, Book Review, 51 HARV. L. REV. 369 (1937). It might also be noted that the American Law Institute accepted the premise and name of the *Restatement of Restitution* without comment. 13 AMERICAN LAW INSTITUTE PROCEEDINGS 222 (1936).

<sup>260</sup> Jackson, *The Restatement of Restitution*, 10 MISS. L.J. 95, 96 (1938); Logan, Book Review, 2 MODERN L. REV. 153, 154 (1938); see J. DAWSON, UNJUST ENRICHMENT (1951); S. STOLJAR, QUASI-CONTRACT 1 (1964); Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 MO. L. REV. 223 (1936); Mech-em, Book Review, 25 IOWA L. REV. 187, 188 (1939).

<sup>261</sup> 5 R. POUND, JURISPRUDENCE 243-44 (1959).

<sup>262</sup> 51 HARV. L. REV. 369 (1937).

<sup>263</sup> Seavey & Scott, *Restitution*, 54 L.Q. REV. 29 (1938).

<sup>264</sup> Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 MO. L. REV. 223, 230 (1936). Professor Patterson also wrote a later article in which he seemed to accept the *Restatement's* terminology. Patterson, *Improvements in the Law of Restitution*, 40 CORNELL L.Q. 667 (1955).

<sup>265</sup> Jackson, *The Restatement of Restitution*, 10 MISS. L.J. 95 (1938).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 96.

<sup>268</sup> Logan, Book Review, 2 MODERN L. REV. 153 (1938).

<sup>269</sup> *Id.* at 154. Jackson argued that the term "restitution" is inappropriate

the *Restatement's* definition of restitution makes it a property right or an action in rem.<sup>270</sup> The validity of this argument is dependent on restitution being considered a remedy. That is, if restitution is a remedy, recovery is limited to what the plaintiff lost, i.e. specific property. As pointed out above, however, restitution should not be considered a remedy, in which case there would be no such limitation and the action could be in personam.<sup>271</sup> Logan further argued that the term "restitution" is inappropriate to head the category because ejectment and detinue are restitutionary, but are not included in the category by the *Restatement of Restitution*.<sup>272</sup> It is thought this argument carries little weight. First, the fact that these actions were not treated by the *Restatement* does not necessarily exclude them from the category; second, even if they are excluded, this does not present an argument against the term "restitution" since logic does not form the only basis of a classification.<sup>273</sup> Jackson and Logan's main objection to the use of restitution is based on the term's connotation of a remedy rather than a source of the obligation.<sup>274</sup> This objection has some logical merit if restitution is considered a remedy. Even if restitution is not considered a remedy, the argument cannot be dismissed because contract and tort do connote the basis of the obligation, while restitution apparently does not. A closer look, however, reduces the force of this argument considerably. The word "tort" is derived from the Latin *tortus* meaning twisted.<sup>275</sup> In the English language it has come to mean wrong<sup>276</sup> and, as such, connotes the basis of the category of law it now titles. Restitution is derived from the Latin *restitutio* meaning restoring<sup>277</sup> and has come to mean "a restoration of anything to its *rightful* owner."<sup>278</sup> It is further submitted that "restitution" has already gained considerable acceptance in its "restore when just" definition,<sup>279</sup> and it only remains for time to complete the transformation.

In summary, the term "restitution" has been used in two contradictory senses, right and remedy. However, at the present stage in the development of the category of law called "Restitution," it is no easy task to eliminate either usage of the word. Because restitution is not a remedy in the true sense of the word, and because it has considerable support as the title of a category of law, it is suggested that the former usage, i.e. a right, is the more desirable. In any event the important point is the need for consideration by, and agree-

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for either section of the *Restatement*. Jackson, *The Restatement of Restitution*, 10 MISS. L.J. 95, 103 (1938).

<sup>270</sup> Logan, Book Review, 2 MODERN L. REV. 153, 154 (1938).

<sup>271</sup> The action at law is in personam. Independent School Dist. v. City of White Bear Lake, 208 Minn. 29, 292 N.W. 777 (1940). However, the constructive trust remedy is in rem. Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 42 (1938).

<sup>272</sup> Logan, Book Review, 2 MODERN L. REV. 153, 154 (1938).

<sup>273</sup> Note 66 *supra*.

<sup>274</sup> Jackson, *The Restatement of Restitution*, 10 MISS. L.J. 95 (1938); Logan, Book Review, 2 MODERN L. REV. 153, 154 (1938).

<sup>275</sup> W. PROSSER, TORTS 2 (3d ed. 1964).

<sup>276</sup> *Id.*

<sup>277</sup> WEBSTER'S NEW INTERNATIONAL DICTIONARY 2125 (2d ed. 1951).

<sup>278</sup> *Id.* (emphasis added).

<sup>279</sup> 46 AM. JUR. *Restitution and Unjust Enrichment* at 99 (1943).



ment among, the legal writers, the courts and the practicing lawyers regarding a more precise definition and application of the terminology of restitution.

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